NOTIFICATION AND FEDERAL EMPLOYEE ANTI-DISCRIMINATION AND RETALIATION ACT OF 2001

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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NOTIFICATION AND FEDERAL EMPLOYEE ANTIDISCRIMINATION AND RETALIATION ACT OF 2001

Wednesday, May 9, 2001

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to call, at 10:04 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. (Chairman of the Committee) presiding.

Chairman SENSENBRENNER. The Committee will be in order. The Chair asks unanimous consent for him to declare a recess at any time during the hearing today and I understand that a journal vote is scheduled right after 10:00. So we are going to get going very quickly.

The Federal Government is supposed to enforce the laws that protect employees from discrimination and retaliation. But it sadly appears that the Federal Government at times has failed to meet this standard. According to the GAO, discrimination complaints by Federal employees grew tremendously in the 1990's. In fact, in fiscal year 1999, the number of complaints to the EEOC was about 120 percent greater than the number of complaints in 1991. The GAO reported that complaints alleging retaliation against employees who had participated in the complaint process had increased as well.

That very type of retaliation is what brings us here today. A number of brave EPA employees and scientists came forward to tell the Science Committee, which I chaired at the last Congress, about a culture of intolerance and hostility at the EPA. By assisting a congressional investigation, those employees risked retaliation and some experienced it. In fact, the Labor Department concluded that the EPA had retaliated against a female scientist because the Science Committee used a memorandum she wrote over 10 years prior to one of the hearings on the issue.

She did not even know the Committee had obtained her memorandum but was still punished by the agency. I will note that according to The Washington Post, the new Administrator of EPA, Christine Todd Whitman, is taking steps to rectify problems at that agency. That is good news, but from what we learned from the oversight investigation, a change in the current law is needed to ensure that all agencies are held accountable for discrimination and retaliation against Federal employees.

In the response from what we learned from the oversight investigation, I, along with Representative Jackson Lee, introduced H.R. 169, the "Notification and Federal Employee Antidiscrimination and Retaliation Act of 2001." The No FEAR Act would require agencies to pay for the settlements or judgment against them and whistleblower and discrimination cases instead of allowing them to pay for such judgments out of a government-wide general fund. This will make the agencies more accountable for their actions. The bill would also require notification to employees of their rights under the various whistleblower and discrimination laws.

The notification requirement is intended to prevent discrimination and harassment in the first place by making employees and managers aware of rules. Additionally, the bill would require agencies to report to Congress on the number of cases alleging intolerance, the disposition of those cases and the cost of the judgments to the American taxpayer and the number of employees disciplined for discrimination, harassment or retaliation.

This information will help to determine if there is a pattern of misconduct and whether an agency is disciplining those employees or managers involved in that behavior. Such tracking of complaints, cases and costs is not required today. H.R. 169 enjoys a broad show of diverse support. The NAACP has endorsed the bill as well as the National Taxpayers Union. Parenthetically, that I will state, that must make it a very good bill or an outrageous rape of the taxpayers. I prefer the former. We have some of the most liberal Members of Congress and some of the most conservative sponsoring this bill.

Just like private sector employees, Federal employees are protected against discrimination and retaliation. Just like the private sector, Federal agencies must be held accountable. With that, I would like to thank the witnesses appearing before this Committee on this important issue, and I look forward to hearing their testimony. Without objection, the opening statement of Mr. Conyers and other Members of the Committee will be inserted in the record at this point.

[Statements follow in the Appendix]

Chairman SENSENBRENNER. The witnesses today are our former colleague, the Honorable Kweisi Mfume, president and CEO of the NAACP; Mr. Jay Christopher Mihm, director of Strategic Issues of the United States General Accounting Office; Mr. Bobby L. Harnage, Sr., national president of the American Federation of Government Employees; and Dr. Marsha Coleman-Adebayo, a private citizen and a former EPA employee who won a significant settlement as a result of discrimination practiced against her. Would all of you please stand and raise your right hand and take the oath.

[Witnesses sworn.]

Chairman SENSENBRENNER. Let the record show that each of the witnesses answered in the affirmative. Without objection, all of witnesses' prepared statements will be included in the record after their testimony.

Chairman SENSENBRENNER. I would like to ask each of witnesses to summarize their testimony in about 5 minutes, and then at the end of the panel, we will open it up for questioning for Members

of the Committee, and here comes the Journal vote, so the Committee will be recessed pending the Journal vote, and I would ask Members following the Journal vote to come back promptly so that we can continue. The Committee stands in recess.

[Recess.]

Chairman SENSENBRENNER. The Committee will be in order and the witnesses will please take their seats. And Mr. Mfume, you are first up, and would the witnesses please summarize their statements in about 5 minutes so we will have more time for questions.

STATEMENT OF THE HONORABLE KWEISI MFUME, PRESIDENT AND CEO, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Mr. MFUME. Thank you, Mr. Chairman. I will work very hard to do that. I want to first begin by thanking you and Ranking Member Conyers,—who I understand will be joining us shortly—for your support on this issue and for really taking the lead. I appreciate you holding this hearing as well as all of your efforts to shed light on this very important issue. As my testimony will reflect the NAACP is especially appreciative of your efforts and the efforts of Congresswoman Sheila Jackson Lee to address this problem of Federal employee discrimination, both through legislation and through hearings such as this. As a former Member of this body, it is an honor always to sit before this distinguished Committee.

I want to particularly applaud, as you referenced earlier, Mr. Chair, the bipartisan efforts to discuss and to find solutions to this persistent problem of racism, sexism and anti-Semitism that, in the aggregate, continue to plague this Nation and have done so far too long. You, Mr. Conyers, and others, and particularly those on this Committee, are to be commended.

Unfortunately Mr. Chairman, I am here because Federal employees today are still subjected to racial, religious, and gender discrimination with little or no recourse. We believe, obviously, that this is a moral disgrace. Discrimination anywhere in the United States is reprehensible and should not be tolerated. It is especially, however, disconcerting when it takes place in the Federal Government. Fair employment, equal employment opportunities should be basic cornerstones of the government.

Discrimination and retaliation against people who complain about it and their supporters is rampant in Federal departments, and quite frankly, in agencies across the Nation. And perhaps more problematic is the fact that even complaining about racially discriminatory behavior on the job or even supporting someone who complains about it is often tantamount to a death sentence for a person's career within our own government. And so the individual who speaks out is often faced with harassment, and in some instances, even personal danger.

In February 1998, subsequent to a summit that we held at the NAACP, we established a Federal sector task force with representatives of four States and the District of Columbia. And the primary purpose of task force was to investigate and to address these ever-growing complaints about discrimination within our government. Much of the testimony that I present today comes formally from that task force led by our national board member, Leroy Warren,

who is here along with several members of that task force itself. Since its inception, the task force has received and continues to receive hundreds of complaints each year, many of these complaints are from ethnic minority Federal employees, who also have heard, as we have, of this ongoing trend toward these discriminatory issues. Interestingly enough, we have also heard from white men and white women who have apparently been punished by their superior for upholding existing antidiscrimination law and existing regulations.

In recent months, the task force has also begun hearing from an even broader prospective and spectrum of people, specifically Jewish men and Jewish women who have also been subjected to discrimination and harassment based on their religious beliefs.

So the common thread among all of the complaints that the NAACP has received as well as those in our own subsequent investigations is a nationwide pattern of discrimination that heretofore has not been adequately addressed and certainly not eliminated.

A 1999 survey conducted at the Bureau of Printing and Engraving, a satellite facility, to be exact, in Fort Worth, Texas, 92 percent of the people surveyed said they had been personally subjected to some form of discrimination on the job because of their race, their color, their national origin, their age, their handicap, their marital status and even their political affiliation. This means, at best, we're able to determine that not only is race based and other types of discrimination pervasive throughout this facility and oftentimes throughout our government, but that it is also common knowledge. Unfortunately this facility is typical of many of the others that we have surveyed, including departments right here in Washington, D.C., and I'll quickly try to give the Committee a couple of examples.

Number one, an employee at the national headquarters of the Federal Aviation Administration complained to her supervisor and other high ranking officials about displays of the confederate flag and references to slavery at the FAA that many people there found offensive. Subsequent to her complaining, her car was vandalized while parked on the FAA lot, and to add insult to injury, no disciplinary action was ever taken against the people who initiated what amounted to be racially offensive actions in the first place.

At the U.S. Department of Agriculture headquarters here in Washington, someone defined the NAACP as the "Now Apes are Called People" organization. They put that on the wall. A copy of the racial epitaph is forwarded to the president of the Coalition of Minority Employees at USDA and sent directly to his church for his receipt. No one was ever investigated and held responsible for either action.

And so as indicated earlier, while the problems of racial discrimination and intimidation exist here in Washington, they can be found throughout facilities across our Nation.

Another example is a hanging noose sign that is referenced on the charts to my right stating "staff attitude adjustment notice" that was found in a black employee's work place at the U.S. Corps of Army Engineers in Concord, Massachusetts. In addition to this overt intimidation, Latino, Asian and black Federal employees have consistently found that they have been discriminated against, and

oftentimes routinely, as a result of that, miss out on promotions because of their race or their ethnicity.

In Washington, employees at the Library of Congress successfully filed a class action lawsuit alleging, among other things, racial discrimination, and yet despite repeated findings which the court, in favor of those employees, the Library continues to have even its own set of problems.

In my testimony is referenced the case of Dr. William Ellis, which illustrates, we believe, the Library's ongoing failure to validate its competitive selection procedures and the illegal use of reassignments and details, which confers professional treatment among some who were usually whites, and then effectively grooms them for higher positions while passing over others for reasons that we still don't really understand.

Dr. Ellis is an African American senior specialist at the Congressional Research Service. He's been denied a promotion despite some 30 years of work experience and an exemplary work record.

And so, Mr. Chairman, suffice it to say that a careful examination of the record will show that race and gender-based discrimination and intimidation still run rampant in the Federal employment sector, and real and comprehensive policies as well as vigorous enforcement of those policies is needed if that discrimination is ever going to be stopped.

Let me just, if I might, in supporting this bill and supporting your efforts, take a moment to point out how a few of the potential repercussions, and quite frankly real dangers that are inherent in this sort of discrimination can come back to hurt us and to clearly hurt our government.

First, by allowing the status quo to continue within the Federal Government, we are placing the safety and the service of dedicated workers as well as taxpaying citizens at risk. Agencies know that they cannot, or should not, discriminate. And yet in many instances, we have seen this still taking place. This includes such agencies as the USDA, the Department of Defense and the U.S. Marshall Service, all of which are charged with protecting various aspects of our citizenry. Recently, each one of these agencies has also been found guilty by our Nation's courts of maintaining unbearable working conditions fostered by atmospheres of racial disharmony and mistrust.

I share the feelings of outrage, as I am sure many Members of this Committee do, who realize that our tax dollars are being utilized in too many cases to support institutionalized race and gender discrimination within the Federal ranks. It was shocking to me, and I am sure it will be shocking to many Members of this Committee and the full House, to discover the amount of time, the amount of money and the amount of resources that are expended simply defending the Federal Government against such actions.

Chairman SENSENBRENNER. Mr. Mfume you are about 3 1/2 minutes over your time. Do you think we could wrap it up so we can get to the others?

Mr. MFUME. I certainly will. You are very generous, Mr. Chairman, and I will be use the term "liberal," and say that you are very liberal with your time. Let me just say this, and refer obviously all of you to the full set of testimony. We believe that H.R. 169 is a

step in the right direction. It is a good first step, a good way to proceed.

Again, the Chair and Ms. Jackson Lee and others who have supported this are to be commended. I really want to thank the distinguished Members of this Committee for having a chance to bring these issues forward, as I am sure the others who give testimony will also thank you.

At the end of the day we believe that the bottom line is to ensure that discrimination of all types within the Federal Government must be eradicated, and that America's Federal employees who are black and white and Jewish and Latino and Asian are treated equally and treated fairly in the workplace.

Thank you, Mr. Chairman and I will yield back time that I do not have.

Chairman SENSENBRENNER. Thank you, Mr. Mfume and this is the first time in a long time that anybody has called me liberal.

[The prepared statement of Kweisi Mfume follows:]

PREPARED STATEMENT OF KWEISI MFUME

Thank you, Chairman Sensenbrenner and Ranking Member Conyers, for inviting me here today to talk about the important issue of employment discrimination within the federal government. I appreciate your holding this hearing as well as all of your hard work to address this issue.

As my testimony will reflect, the NAACP is especially appreciative of the efforts that you, Chairman Sensenbrenner, as well as Congresswoman Sheila Jackson Lee have undertaken to address this problem both through legislation as well as through hearings such as this one that help shed light on the problem.

It is also an honor, as always, to sit before Congressman John Conyers to talk about how to address the persistent problem of racism that has plagued this nation for too long. Congressman Conyers has worked tirelessly with the NAACP on racial discrimination issues and we look forward to many more years of your leadership in this area.

Unfortunately, federal employees today are often subjected to racial and gender discrimination with little or no recourse.

This is morally disgraceful, as discrimination anywhere in the United States is reprehensible and should not be tolerated. It is, however, especially disconcerting as the federal government should serve as a model of best practices for fair employment and equal opportunity to national and international companies.

Discrimination, and retaliation against people who complain about it and their supporters, is rampant in federal departments and agencies across the nation.

Perhaps more problematic is the fact that complaining about racially discriminatory behavior on the job, or even supporting someone who complains, is often tantamount to a death sentence for a person's career within the federal government and the individual is often faced with harassment and in some cases personal danger.

In response to the rapidly expanding number of complaints of discrimination by federal employees the NAACP, in January, 1998, held a Federal Sector Employment Discrimination Summit at the University of Maryland at College Park. Subsequent to the summit, in February, 1998, the NAACP established our Federal Sector Task Force with representatives from four states and the District of Columbia to investigate and address the ever-growing number of complaints of discrimination within the federal government. Much of the testimony that I have for you today comes from the Task Force, which is led by NAACP National Board Member, Mr. Leroy Warren.

Since its inception, the Task Force has received and continues to receive hundreds of complaints each year. While many of these complaints are from ethnic minority federal employees, we have also heard from Caucasian males and females, who have been apparently punished by their superiors for essentially upholding existing anti-discrimination laws and regulations. In recent months, the Task Force has also begun hearing from an even broader spectrum of people, specifically Jewish men and women, who have been subjected to discrimination and harassment because of their religious beliefs.

Through all of the complaints we have received, as well as our own subsequent investigations, the NAACP continues to see a nation-wide pattern of discrimination that has, heretofore, not been adequately addressed and certainly not eliminated.

In a 1999 survey conducted at the Bureau of Printing and Engraving satellite facility in Fort Worth, Texas, 92% of the people surveyed said they had either been personally subjected to discrimination on the job because of their race, color, religion, national origin, age, handicapped condition, marital status or political affiliation or they knew of a co-worker who had suffered from some form of discrimination. This means that not only is race-based discrimination pervasive throughout this facility, but that it is also common knowledge.

Unfortunately, this facility is typical of many others that the NAACP Task Force has investigated, including departments right here in Washington, D.C.

An employee at the national headquarters of the Federal Aviation Administration complained to her supervisor and other high-ranking officials about the display of confederate flags and references to slavery at the FAA that many found offensive. Subsequent to her complaining, her car was vandalized while parked in the FAA parking lot. To add insult to injury, no disciplinary action was ever taken against the people who initiated the racially offensive actions in the first place. Nor were the people responsible for vandalizing the employee's car ever brought to justice.

At the US Department of Agriculture headquarters here in Washington, somebody defined the NAACP as "Now Apes Are Called People" on a wall. A copy of this racial epithet was then forwarded to the President of the USDA Coalition of Minority Employees at his church in Alabama. No one was ever held responsible for either action.

As I indicated earlier, while the problems of racial discrimination and intimidation exist here in Washington, they can also be found at federal facilities throughout the United States. For instance, a hanging noose and sign stating "Staff Attitude Adjustment Notice" was found in an African American's workspace at the US Army Corps of Engineers District Office in Concord, Massachusetts.

In addition to this overt intimidation, federal employees of color have consistently found that they have been discriminated against, and routinely missed out on promotions because of their race. Here in Washington, African American employees at the Library of Congress successfully filed a class action lawsuit alleging, among other things, racial discrimination. Despite repeated findings by the Courts in favor of the employees, the Library continues to have problems.

The case of Dr. William Ellis illustrates the Library's ongoing failure to validate its competitive selection procedures and the illegal use of reassignments and details, which confers professional treatment to Caucasians, and effectively grooms them for higher positions. Dr. Ellis, an African American Senior Specialist at the Congressional Research Service was denied a promotion despite some 30 years of experience. Dr. Ellis has testified that Library officials "routinely groom Caucasian employees for upper management and give preferred Caucasian employees . . . assignments and positions which confer an unfair advantage when competing for senior positions."

In addition to the individual stories, another indicator of the extent of this problem may be the number of class action lawsuits that have been filed within the last thirty years and continue to be filed today. Just a few of these actions include: In 1975, African American employees filed a class action lawsuit against the Library of Congress. In a 1992 declaratory judgment, the U.S. District Court concluded that the Library had clearly and systematically discriminated against African Americans because of their race.

- In 1995, an organization known as Black Males for Justice at the Social Security Administration filed a class action complaint of discrimination with the Social Security Administration. In April of 1997, an administrative judge at the Equal Employment Opportunity Commission (EEOC) issued a recommendation that the complaint be accepted as a Class Action Complaint. A month later, the Social Security administration issued a final agency decision rejecting the decision of the EEOC.
- In 1995, female employees of the United States Department of Agriculture Forest Service in the Pacific Southwest Region filed a lawsuit on behalf of 6,000 members charging that the region maintains a sexually hostile work environment and has engaged in a pattern and practice of sexual harassment and retaliation against female employees.

Suffice it to say that a careful examination of the record will show that race- and gender-based discrimination and intimidation are still rampant within the federal employment sector, and that real and comprehensive policies, as well as, the vigorous enforcement of these policies are needed if discrimination is going to be stopped.

It may be a cliche, but it appears that it is going to take an Act of Congress to make the federal agencies, departments and other government entities, address the problems that exist within their own ranks.

Before I get into specific details about what needs to be done, I would like to take a minute and point out a few of the potential repercussions and, quite frankly, real dangers that are unique to racial discrimination within the federal government.

First, by allowing this status quo to continue within the federal government, we are placing the safety and service of both our dedicated workers, as well as our tax-paying citizens at risk. Agencies that cannot or are unwilling to acknowledge discrimination or retaliation within their own ranks cannot be operating productively. This includes agencies such as the USDA, the Department of Defense, and the US Marshall's Service, all of which are charged with protecting various aspects of our population and all of which have fairly recently been found guilty by our nation's courts of maintaining unbearable working conditions fostered by atmospheres of racial disharmony and mistrust.

Secondly, in addition to the feelings of outrage that I, and others have when we realize that our tax dollars are being utilized, in all too many cases, to support institutionalized race and gender discrimination within the federal ranks, it was shocking to me to discover the amount of time, money and other resources that are expended defending the federal government in these legal actions. It has been estimated that the average EEO investigation costs the federal government approximately $3,000. Add to this the cost of waging a legal defense in all of the class action lawsuits, as well as the amount of tax-payers' money spent in both settlements and court rulings against the government, and you find the burden to our federal government is staggering.

So, how is it that racial and gender employment discrimination of this magnitude is able continue almost unchecked in the year 2001? This is particularly perplexing given the economic costs, the threats to public safety, as well as the gross disregard for the public trust. The over-riding answer appears to be a lack of incentive in some cases and ability in others on the part of managers and those responsible for overseeing the action of federal employees to stop the problem.

Specifically, there are currently no sanctions or other deterrents in place to punish federal departments or agencies that engage in or allow discrimination to fester within their ranks. Persons and Departments found guilty of discriminatory actions pay virtually nothing; a majority of the money spent on settlements or judgments comes from the Federal Treasury Judgment Fund.

Furthermore, the EEOC lacks adequate funding as well as federal authority to intervene rapidly, even in the most blatant discrimination cases. In addition to looking at how we can make individuals, departments and agencies more accountable, I hope that Congress will take the time to look at how we can strengthen and enhance the EEOC authority and scope.

In my discussions with the NAACP Task Force members, as well as other members of the civil rights community, there seems to be an overriding consensus that the EEOC needs more staff and more resources if it is going to adequately meet the challenges that it has been presented with in the last decade. Even a casual examination of the amount of funding provided to the EEOC over the last few years by Congress and the Administrations makes us wonder how the EEOC has been able to achieve all that it has, as well as marvel at what could be if it had adequate funding and authority.

The bill introduced by Chairman Sensenbrenner and Congresswoman Jackson Lee, H.R. 169, is a positive step in enhancing our approach to eliminating discrimination within the federal sector. By requiring that federal agencies be held accountable for violations of anti-discrimination and whistleblower protection laws, H.R. 169 renews efforts to address a problem that has been allowed to fester far too long. Furthermore, by requiring that federal agencies notify their employees of their rights under discrimination and whistleblower statutes, H.R. 169 would require the federal government to send an important message to all it employees that we are serious about ensuring that people's rights are protected.

The portion of H.R. 169 that requires that federal agencies report to Congress each year on the number of discrimination complaints lodged against it, as well as the disposition of such cases would also let employees know that their rights are being monitored, and that Congress is watching out for them.

Finally, the language in H.R. 169 requiring that federal agencies pay out of their own budgets any discrimination or whistleblower judgments, awards or settlements against the agency, would clearly help make agency administrators as well as Department Secretaries more aware of what is happening and more interested in taking steps to prevent these discriminatory practices.

In short, I commend Chairman Sensenbrenner, Congresswoman Sheila Jackson Lee and this committee for taking on this crucial problem, and introducing this important legislation. If nothing else, it advances the need to put the federal government on alert that racial and gender discrimination is being noticed and will not be tolerated.

Thank you for the opportunity to bring these issues before the Committee and I look forward to working with you to make certain that all of America's federal employees are able to work in an environment which is free of discrimination and intimidation.

Chairman SENSENBRENNER. Mr. Mihm.

STATEMENT OF J. CHRISTOPHER MIHM, DIRECTOR, STRATEGIC ISSUES, UNITED STATES GENERAL ACCOUNTING OFFICE

Mr. MIHM. Thank you, Mr. Chairman. It is a pleasure and an honor to be here this morning to provide information for your deliberations on the No FEAR Act. Over the years, Congress has put in place a statutory framework to help ensure that Federal employees are able to achieve results in an environment free from discrimination and the fear or experience of retaliation or reprisal for blowing the whistle on waste, fraud and abuse.

Unfortunately, and as Mr. Mfume detailed, despite these protections, some Federal employees have experienced or believe that they have been subject to workplace discrimination or reprisal for whistleblowing. Such experiences or perceptions, and the complaints and lawsuits that they spur not only disrupt the lives of the affected employees, they also undermine the efficient and effective delivery of government services to the public and discourage our goals of a diverse, pluralistic and accountable workforce. With these thoughts in mind, I will hit the highlights of the three points detailed in my written statement concerning the need for first, better reporting; second, accountability; and third, notification. As you know, the No FEAR Act seeks to address each of these issues. First in regards to reporting, as you mentioned in your opening statement, Mr. Chairman, because data are not currently available, there is no clear picture on the number of complaints of workplace discrimination and reprisal for whistleblowing at agencies or government-wide or the outcome of those cases.

In addition, although initiatives are under way to deal with data shortcomings, key information is still lacking on the relationship between the statutory basis of complaints, for example, race, sex or disability, and the kind of issues such as nonselection for promotion or harassment that were cited in the complaints.

The point here is that such data are important because they can be a starting point for Congress, agency managers, and the public to better understand the nature and scope of issues in the workplace involving discrimination, reprisal, conflict and other problems and can help in developing strategies for dealing with these issues.

In short, if we don't know the scope of the problem and the nature of the problem, we can't begin to start addressing it.

Second, in regards to accountability, agencies and their leaders and managers must be accountable for providing a fair and equitable workplace free from discrimination and reprisal. Data along the lines that I just mentioned is helpful in that it fosters transparency, which in turn provides an incentive for agency leadership

to improve performance and enhance the imagine of the agency in the eyes of both its employees and the public.

The No FEAR Act includes another possible means for promoting accountability by having agencies, as you mentioned, Mr. Chairman, in your opening statement, more fully bear the cost of payments of complainants and their lawyers made in resolving cases of discrimination and reprisal. However, just as it is important for agencies to be held accountable, so must individuals be held accountable for their misconduct. In that regard, published statistical data as envisioned by the Act can be important for agencies to send clear, unmistakable messages to their employees that individuals will be held accountable for their actions in cases involving discrimination, retaliation or harassment.

My third point this morning concerns notification. In order for the full benefit of the laws protecting the workforce to be realized, agencies need to take steps to make Federal employees sufficiently aware of their protections, from discrimination and reprisal. There has been wide spread concern that Federal employees were not sufficiently aware of their protections, particularly about protections in regards to reprisal for whistle blowing. And without this knowledge of their protections they may not come forward for fear of reprisal. We pointed out this lack of awareness—we first pointed this out back in 1992 and available data suggests it is still a problem today.

In summary, Mr. Chairman, to help ensure economical, efficient, effective delivery of services for the benefito f the American people, allegations of discrimination and reprisal in the Federal workforce must be dealt with in a fair, equitable, and timely manner. Doing so requires first reliable and complete reporting of data as a starting point to understand the nature and scope of issues in the workplace involving discrimination.

Second, agencies and individuals must be held accountable for their actions; and third, the workforce must be aware of laws protecting them from discrimination and reprisal not only to deter this type of conduct, but also so that employees will know what type of action to take when this misconduct has occurred.

Mr. Chairman, Members of the Committee this concludes my statement. I will be pleased to answer any questions that you have.

Chairman SENSENBRENNER. Thank you, Mr. Mihm.

[The prepared statement of J. Christopher Mihm follows:]

PREPARED STATEMENT OF J. CHRISTOPHER MIHM

Mr. Chairman and Members of the Committee:

I am pleased to have this opportunity to provide information for your deliberations on H.R. 169, the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2001, commonly referred to as the No FEAR Act.

In a high-performing workplace, federal employees must be able to pursue the missions of their organizations free from discrimination and should not fear or experience retaliation or reprisal for reporting—blowing the whistle on—waste, fraud, and abuse. To help achieve such a workplace, federal antidiscrimination laws protect these employees from discrimination based on their race, color, sex, religion, national origin, age, or disability, as well as retaliation for filing a complaint of discrimination.[1] In addition, the Civil Service Reform Act of 1978 articulates the merit system principles for the fair and equitable treatment of the federal workforce and defined personnel practices that are prohibited. Among the prohibited personnel

[1] Applicants for federal employment are also covered under these laws.

practices is reprisal for whistleblowing. Several other laws also protect employees from reprisal by prohibiting agencies' taking or threatening to take—or not to take—a personnel action because of an employee's whistleblowing activities.

Unfortunately, despite these protections, some federal employees have experienced or believe that they have been subject to workplace discrimination or reprisal for whistleblowing. Such experiences or perceptions—and the complaints and lawsuits they spur—not only disrupt the lives of the affected employees, they can also undermine the efficient and effective delivery of government services to the public and discourage a diverse, pluralistic, and accountable workforce.

With these thoughts in mind, I have three points to make that relate to the principles underlying the proposed act.

- *Reporting.* Because data are not readily available, there is no clear picture of the number of complaints of workplace discrimination and reprisal for whistleblowing at agencies or governmentwide and the outcome of these cases. Data of this nature are important because they can be a starting point for agency managers to understand the nature and scope of issues in the workplace involving discrimination, reprisal, and other conflicts and problems, and can help in developing strategies for dealing with those issues.
- *Accountability.* Accountability is a cornerstone of results-oriented management. Agencies and their leaders and managers should be accountable for providing fair and equitable workplaces, free from discrimination and reprisal. In addition, individuals need to be held accountable for their actions in cases where discrimination or reprisal for whistleblowing has occurred.
- *Notification.* Finally, in order for the full benefit of laws protecting the workforce to be realized, agencies need to take steps to make federal employees sufficiently aware of their protections from discrimination and reprisal for whistleblowing.

In making our observations today, and as agreed with the Committee, I will draw upon our work examining discrimination and whistleblower issues in the federal workplace and performance management principles embodied in the Government Performance and Results Act, particularly in regard to human capital.

REPORTING: NO CLEAR PICTURE OF COMPLAINT ACTIVITY

The federal government lacks a clear picture of the volume of discrimination and whistleblowing reprisal cases involving federal employees. The lack of a complete accounting of cases is in part a by-product of the complexity of the redress system for federal employees and the different ways in which case data are reported. The No FEAR Act would require agencies to report the number of discrimination and whistleblower reprisal cases.

Executive branch civil servants are afforded opportunities for redress of complaints of discrimination or retaliation for whistleblowing at three levels: first, within their employing agencies; next, at one of the administrative bodies with sometimes overlapping jurisdictions that investigate or adjudicate their complaints; and, finally, in the federal courts. [2]

- Where discrimination is alleged, the Equal Employment Opportunity Commission (EEOC) hears complaints employees file with their agencies and reviews agencies' decisions on these complaints.[3] In a case in which an employee alleges that discrimination was the motive for serious personnel actions, such as dismissal or suspension for more than 14 days, the employee can request a hearing before the Merit Systems Protection Board (MSPB). MSPB's decisions on such cases can then be reviewed by EEOC.
- For federal employees who believe that they have been subject to whistleblower reprisal, the Office of Special Counsel (OSC) will investigate their complaints and seek corrective action when a complaint is valid. When agencies fail to take corrective action, OSC or the employee can take the case to MSPB for resolution. Alternatively, an employee can file a whistleblower reprisal complaint directly with MSPB, if the personnel action taken against

[2] We have previously reported that the redress system for federal employees has been criticized for being adversarial, inefficient, time-consuming, and costly. See Federal Employee Redress: A System in Need of Reform (*GAO/T-GGD-96–110*, Apr. 23, 1996) and Federal Employee Redress: An Opportunity for Reform (*GAO/T-GGD-96–42*, Nov. 29, 1995).

[3] Discrimination complaints against federal agencies are processed in accordance with regulations promulgated by EEOC. Complaints are filed with and investigated by agencies with hearings conducted by EEOC administrative judges. EEOC also hears appeals of agency and administrative judges' decisions on cases.

the person is itself appealable to MSPB. In addition, under certain environmental laws and the Energy Reorganization Act, employees can ask the Department of Labor (DOL) and the Nuclear Regulatory Commission to investigate their complaints.

- Employees who belong to collective bargaining units represented by unions can also file grievances over discrimination and reprisal allegations under the terms of collective bargaining agreements. In those situations, the employee must choose to seek relief either under the statutory procedure discussed above or under the negotiated grievance procedure, but not both. If an employee files a grievance alleging discrimination under the negotiated grievance procedure, the Federal Labor Relations Authority (FLRA) can review any resulting arbitrator's decision. A grievant may appeal the final decision of the agency, the arbitrator, or FLRA to EEOC.

A complainant dissatisfied with the outcome of his or her whistleblower reprisal case can file an appeal to have the case reviewed by a federal appeals court.[4] An employee with a discrimination complaint who is dissatisfied with a decision by MSPB or EEOC, however, can file a lawsuit in a federal district court and seek a de novo trial.[5]

With reporting requirements and procedures varying among the administrative agencies and the courts, data on the number of discrimination and whistleblower reprisal cases are not readily available to form a clear and reliable picture of overall case activity. However, available data do provide some insights about caseloads and trends. These data and our prior work show that most discrimination and whistleblower reprisal cases involving federal employees are handled under EEOC, MSPB, and OSC processes, with complaints filed under EEOC's process by far accounting for the largest volume of cases. In fiscal year 2000, federal employees filed 24,524 discrimination complaints against their agencies under EEOC's process. In fiscal year 2000, MSPB received 991 appeals of personnel actions that alleged discrimination. MSPB also received 414 appeals alleging whistleblower reprisal in fiscal year 2000, while OSC received 773 complaints of whistleblower reprisal. There are two caveats I need to offer about these statistics. The first is that because of jurisdictional overlap among the three agencies, the statistics cannot be added together to give a total number of discrimination and whistleblower reprisal complaints. The second caveat is that in our past work, we found some problems with the reliability and accuracy of data reported by EEOC.[6]

Notwithstanding these caveats, the available data also show that the last decade saw an overall increase in the number of cases, particularly discrimination complaints under EEOC's jurisdiction.[7] The number of cases under EEOC's jurisdiction, which stood at 17,696 in fiscal year 1991, showed a fairly steady upward trend, peaking at 28,947 in fiscal year 1997. Although the number of new cases each year has declined since fiscal year 1997, the number of cases in fiscal year 2000—24,524—is almost 40 percent greater than in fiscal year 1991, despite a smaller federal workforce.

Caseload data can be a starting point for agency managers to understand the nature and scope of issues in the workplace involving discrimination, reprisal, and other conflicts and problems, and can help in developing strategies for dealing with these issues. However, caseload data can only be a starting point because they obviously do not capture any discrimination or reprisal that is not reported.

As I discussed above, most discrimination complaints are handled within the process under EEOC's jurisdiction. However, we have found in our past work that EEOC does not collect data in a way needed by decisionmakers and program managers to discern trends in workplace issues represented by discrimination complaints, understand the issues underlying these complaints, and plan corrective ac-

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[4] In a whistleblower reprisal case decided by MSPB, an appeal can be filed with the U.S. Court of Appeals for the Federal Circuit. For a case decided by DOL, an appeal can be filed with the U.S. Court of Appeals for the circuit in which the alleged reprisal occurred.

[5] In a DE NOVO trial, a matter is tried anew as if it had not been heard before.

[6] For a further discussion about the reliability and accuracy of data reported by EEOC, see Equal Employment Opportunity: Data Shortcomings Hinder Assessment of Conflicts in the Federal Workplace (*GAO/GGD-99–75*, May 4, 1999).

[7] In earlier reports, we discussed factors behind the increase in the number of discrimination complaints in the forum under EEOC's jurisdiction and how rising caseloads have been accompanied by an increase in case processing time. See Equal Employment Opportunity: Discrimination Complaint Caseloads and Underlying Causes Require EEOC's Sustained Attention (*GAO/T-GGD-00–104*, Mar. 29, 2000); Equal Employment Opportunity: Complaint Caseloads Rising, With Effects of New Regulations on Future Trends Unclear (*GAO/GGD-99–128*, Aug. 16, 1999); and Equal Employment Opportunity: Rising Trends in EEO Complaint Caseloads in the Federal Sector (*GAO/GGD-98–157BR*, July 24, 1998).

tions.[8] Although EEOC has initiatives under way to deal with data shortcomings, relevant information is still lacking on such matters as (1) the statutory basis (e.g., race, sex, or disability discrimination) under which employees filed complaints and (2) the kinds of issues, such as nonselection for promotion or harassment, that were cited in the complaints.[9]

The No FEAR Act would also require agencies to report the status or disposition of discrimination and whistleblower reprisal cases. The available data show that most allegations of discrimination and reprisal for whistleblowing are dismissed, withdrawn by the complainant, or closed without a finding of discrimination. However, many other cases are settled. Of the discrimination cases within EEOC's jurisdiction, 5,794 (21.3 percent) of the 27,176 cases were closed through a settlement. At MSPB, 279 (28.5 percent) of the 980 appeals that alleged discrimination were settled. With regard to the 440 whistleblower cases at MSPB, 93 (21 percent) were settled. While settlements are made when evidence may point to discrimination or reprisal, at other times an agency may make a business decision and settle for a variety of reasons, including that pursuing a case may be too costly, even if the agency believes it would have ultimately prevailed. Finally, in some cases, discrimination or reprisal is found. Of the 27,176 cases within the discrimination complaint process under EEOC's jurisdiction that were closed in fiscal year 2000, 325 (about 1 percent) contained a finding of discrimination. At MSPB, of the 980 cases alleging discrimination, discrimination was found in 4 (four-tenths of a percent). In 440 cases alleging whistleblower reprisal it reviewed, MSPB found that a prohibited personnel practice occurred in 2 (five-tenths of a percent) of the cases. At OSC, favorable actions were obtained in 47 of 671 (7 percent) whistleblower reprisal matters closed in fiscal year 2000.[10]

AGENCY MOVEMENT TOWARD ALTERNATIVE DISPUTE RESOLUTION

It is important to note that agencies have responded to the rise in the number of complaints and the costs associated with them by adopting alternative means of dispute resolution (ADR). Using ADR processes, such as mediation, agencies intervene in the early stages of conflicts in an attempt to resolve or settle them before positions harden, workplace relationships deteriorate, and resolution becomes more difficult and costly. A premise behind a requirement EEOC put in place in 1999 that agencies make ADR available was that the complaint system was burdened with many cases that reflected basic workplace communications problems and not necessarily discrimination. Some agencies, most notably the Postal Service, have reported reductions in discrimination complaint caseloads through the use of ADR. In fact the Postal Service, from fiscal year 1997 through fiscal year 2000, saw a 26 percent decline in the number of discrimination complaints that the agency largely attributes to its mediation program.[11] Because ADR prevents some disputes from rising to formal complaints, a reduction in the number of formal complaints should not necessarily be looked at as a reduction in workplace conflict, but it can indicate that an agency is more effectively dealing with workplace conflict.

Meaningful data along the lines I discussed earlier are useful in helping to measure an agency's success in adhering to merit system principles, treating its people in a fair and equitable way, and achieving a diverse and inclusive workforce. We encourage such assessments of agencies' workplaces and human capital systems to help them align their people policies to support organizational performance goals.[12] In addition, data foster transparency, which in turn provides an incentive to improve performance and enhance the image of the agency in the eyes of both its employees and the public.

Another possible means of promoting accountability might be to have organizations bear more fully the costs of payments to complainants and their lawyers made in resolving cases of discrimination and reprisal for whistleblowing. Currently, federal agencies do not always bear the costs of settlements or judgments in discrimination or reprisal complaints. Agencies will pay these costs when a complaint is re-

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[8] *GAO/GGD-99-75.*

[9] See *GAO/T-GGD-00–104* for a discussion of EEOC initiatives to deal with data shortcomings.

[10] Favorable actions include actions taken directly to benefit the complaining employee; actions taken to punish, by disciplinary or corrective action, the supervisor involved in the personnel action; and systemic action, such as training or educational programs, to prevent future questionable personnel actions.

[11] For a further discussion of ADR initiatives, see Alternative Dispute Resolution: Employers' Experiences With ADR in the Workplace (*GAO/GGD-97–157*, Aug. 12, 1997).

[12] We have prepared Human Capital: A Self-Assessment Checklist for Agency Leaders (*GAO/OGC-00–14G*, Sept. 2000) to help make this assessment.

solved by administrative procedures, such as the discrimination complaint process. However, when a lawsuit is filed, any subsequent monetary relief is generally paid by the Judgment Fund. (One exception is the Postal Service, which is responsible for settlement and judgment costs.) The Judgment Fund provides a permanent indefinite appropriation to pay settlements and judgments against the federal government. Congress created the Judgment Fund to avoid the need for a specific congressional appropriation for settlement and judgment costs and to allow for prompter payments. The No FEAR Act would require that agencies reimburse the Judgment Fund for payments made for discrimination and whistleblower reprisal cases.

Table 1 below shows payments made by agencies for discrimination complaint cases processed under administrative procedures within EEOC's jurisdiction and payments from the Judgment Fund for employment discrimination lawsuits (these were the only readily available data). In addition to attorney fees and expenses, payments made to complainants include back pay, compensatory damages, and lump sum payments. As the table shows, agencies made payments totaling about $26 million in fiscal year 2000 for discrimination complaint settlements and judgments. At the same time, agencies were relieved of paying almost $43 million in cases because of the existence of the Judgment Fund.[13]

Table 1: Payments Made in Discrimination Cases by Agencies and the Judgment Fund, Fiscal Years 1998±2000 (Dollars in Millions)

	FY 1998	FY 1999	FY 2000
Agencies	$24.4	$26.3	$26.1
Judgment Fund	37.1	41.8	42.7
Total	$61.5	$68.1	$68.8

Source: EEOC and Treasury Department Judgment Fund Data.

The availability of the Judgment Fund to pay settlement and judgment costs has brought about debate with regard to agency accountability. On one hand, it could be argued that the Judgment Fund provides a safety net to help ensure that agency operations are not disrupted in the event of a large financial settlement or judgment. It can also be argued, however, that the fund discourages accountability by being a disincentive to agencies to resolve matters promptly in the administrative processes; by not pursuing resolution, an agency could shift the cost of resolution from its budget to the Judgment Fund and escape the scrutiny that would accompany a request for a supplemental appropriation.[14] Congress dealt with a somewhat similar situation when it enacted the Contract Disputes Act[15] in 1978, which requires agencies to either reimburse the Judgment Fund for judgments awarded in contract claims from available appropriations or to obtain an additional appropriation for such purposes. This provision was intended to counter the incentive for an agency to avoid settling and prolong litigation in order to have the final judgment against the agency occur in court. In reconciling these viewpoints on financial accountability, Congress will need to balance accountability with the needs of the public to receive expected services.

Certainly, just as it is important for agencies to be held accountable in cases where discrimination or reprisal for whistleblowing is found, so must individuals be held accountable for engaging in such misconduct. The No FEAR Act would require agencies to report the number of employees disciplined for discrimination, retaliation, or harassment.[16] Published statistical data can be important for agencies to send a message to their employees that individuals will be held accountable for their actions in cases involving discrimination, retaliation, or harassment.

Although we have not done any formal work in this area, we know of two agencies—the Department of Agriculture and the Internal Revenue Service (IRS)—that systematically review outcomes of discrimination cases to determine if any individual should be disciplined. Since January 1998, Agriculture has been reviewing cases in which discrimination was found or in which there were settlement agree-

[13] For additional discussion about payments made by agencies and from the Judgment Fund for discrimination cases, see Discrimination Complaints: Monetary Awards in Federal EEO Cases (*GAO/GGD-95–28FS*, Jan. 3, 1995).

[14] In most lawsuits, the Department of Justice is responsible for handling the litigation and safeguarding the Judgment Fund by approving all settlements.

[15] 41 U.S.C. § 612(c).

[16] EEOC's regulations (29 C.F.R. 1614.102(a)(6)) require that agencies take appropriate action against employees who engage in discriminatory conduct.

ments to determine if an employee should be disciplined for discrimination or misconduct related to civil rights. An Agriculture official said that a formal policy on accountability and discipline in civil rights-related cases was currently pending approval. Since July 1998, IRS has been reviewing cases in which discrimination was found or in which there were settlement agreements to determine if the discrimination was intentional. Where an employee has been found to have discriminated against another employee of IRS (or a taxpayer or a taxpayer's representative), the IRS Restructuring and Reform Act of 1998 provides that the individual be terminated for his or her actions. Only the IRS Commissioner has the authority to mitigate termination to a lesser penalty.

I would also add that besides traditional forms of discipline—such as termination, suspension, or letter of reprimand—employees can be held accountable for their behavior through an agency's performance management system. For example, an employee whose behavior does not rise to the level of discrimination but otherwise demonstrates insensitivity or poor communication skills can and should have that fact reflected in his or her performance appraisal.

The No FEAR Act provides that agencies notify employees of the rights and protections available to them under the antidiscrimination and whistleblower statutes in writing and post this information on their Internet sites. This provision reinforces existing requirements that employees be notified of rights and remedies concerning discrimination and whistleblower protection.[17]

There has been a concern that federal employees were not sufficiently aware of their protections, particularly about protections from reprisal for whistleblowing, and without sufficient knowledge of these protections, may not come forward to report misconduct or inefficiencies for fear of reprisal. We first pointed this out in a report issued in 1992.[18] Now, almost a decade later, OSC has identified "widespread ignorance" in the federal workforce concerning OSC and the laws it enforces, even though agencies are to inform their employees of these protections. According to OSC's fiscal year 2000 Performance Report, responses to an OSC survey indicated that few federal agencies have comprehensive education programs for their employees and mangers.

CONCLUDING OBSERVATIONS

To help ensure economical, efficient, and effective delivery of services for the benefit of the American people, allegations of discrimination and reprisal for whistleblowing in the federal workplace must be dealt with in a fair, equitable, and timely manner. Doing so requires, first, reliable and complete reporting of data as a starting point to understand the nature and scope of issues in the workplace involving discrimination, reprisal, and other conflicts and problems, and to help develop strategies for dealing with these issues. Second, agencies and individuals must be accountable for their actions. Third, the workforce must be aware of laws prohibiting discrimination and whistleblower reprisal to deter this kind of conduct but also so that they know what course of action they can take when misconduct has occurred.

Mr. Chairman, this concludes my prepared statement. I would be pleased to answer any questions you or other Members of the Committee may have at this time.

Chairman SENSENBRENNER. Mr. Harnage. Could you please turn the mike on. I don't think it's on.

STATEMENT OF BOBBY L HARNAGE, SR., NATIONAL PRESIDENT, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

Mr. HARNAGE. I represent 600,000 Federal and D.C. Government employees, and I thank you and your Committee for granting me the opportunity to testify today regarding H.R. 169. This bill will require that Federal agencies will be held accountable for violations of employment discrimination and whistleblower protection

[17] The 1994 amendments to the Whistleblower Protection Act require federal agencies to ensure that their employees are informed of the rights and remedies concerning whistleblower protection. In addition, EEOC's regulations (29 C.F.R. 1614.102(b)(5)) require agencies to make written materials available to all employees and applicants informing them of the variety of equal employment opportunity program and administrative and judicial remedies available to them.

[18] *Whistleblower Protection: Survey of Federal Employees on Misconduct and Protection From Reprisal* (*GAO/GGD-92-120FS*, July 14, 1992).

laws. AFGE has a long history of active involvement in the fight to protect Federal employees from discrimination and against retaliation or whistleblowing actions. AFGE congratulates you for your leadership in offering this legislation to improve agency accountability with respect to whistleblower and discrimination laws.

Mr. Chairman we wholeheartedly support the thrust of this bill, but AFGE is concerned about possible unintended consequences that could end up hurting the Federal employees, whom it is designed to protect. Section three of the bill requires that the amount of any claim, final judgment award or a compromise settlement paid to any current or former Federal employee or applicant in connection with specified antidiscrimination and whistleblower protection proceedings be reimbursed through the government fund established for such payments out of the operating expense of the agency, to which the discrimination or conduct is attributable.

In order to effectuate its intended purpose, AFGE believes a simple amendment could be added to prohibit such agency reimbursements from being paid out of salaries and expense accounts. Salaries and expense accounts should be broadly defined to include salaries, health and retirement, training, child care subsidies, transportation subsidies, tuition assistance for low income parents, frankly anything that serves to compensate agency employees.

Unless a legislative firewall is designed to prevent antidiscrimination payment out of salaries and expense accounts, agencies may be tempted to use those resources to make the payments this bill would require. If so, this bill, which is designed to penalize the Federal agency, would in fact penalize the Federal employees.

Mr. Chairman, your bill states the case in one terse sentence in subsection 2 of section 2. And I quote it here, "Federal agencies cannot be run effectively if they practice or tolerate discrimination." The practice of discrimination is invidious and pernicious. The toleration of discrimination in the Federal workplace is equally invidious and pernicious and yet more harmful. Continued complacency paves the way for continued evil and has a great cost to our citizens, to our government and to the fabric of our country.

Continued complacency provides no incentive for change. Complacency emboldens those would-be offenders.

Mr. Chairman your bill breaks the mold of complacency which has become settled in too many areas of our government.

Indeed, your bill brings personal responsibility to the Federal workplace. The theory underlying this proposal is to create a financial disincentive for discrimination in Federal agencies. If agencies have to pay out of their own budget, agencies will ferret out bad behavior and promote zero tolerance policies regarding discrimination and retaliation against legally protected whistleblower actions. For this reason, AFGE supports the reporting requirements of section 5.

Mr. Chairman, discrimination is not an abstract topic. It has human faces on all sides of this. We would like to recommend further steps to help prevent discrimination in the Federal workplace, to further promote personal responsibility for discrimination. AFGE proposes adding a sensitivity section to this bill which would require managers who are disciplined for discrimination, retaliation,

harassment or any other infraction covered by this bill to attend and participate in such training.

Payment of the fines is not enough to change behavior. Mr. Chairman, rapid privatization of our Federal Government is occurring. The Federal Government appears to be headed in a direction where its function is no more than handing out contracts to vendors. AFGE firmly believes that antidiscrimination measures in this bill must also be applied to private firms with Federal contracts as well. It is time for this government to stop subsidizing the discriminatory actions of the shadow government and prevent that which cannot be done directly by Federal agencies from being done indirectly by Federal contractors. The full faith and credit of the United States government must be granted to those who are employed by entities doing the work of the United States government with Federal dollars.

Mr. Chairman, I look forward to working with you on this bill. I support the testimony of the three other panel members. AFGE fully supports your goal of zero tolerance of discrimination within our government and I will be available to answer any questions.

Chairman SENSENBRENNER. Thank you, Mr. Harnage.

[The prepared statement of Bobby L. Harnage, Sr. follows:]

PREPARED STATEMENT OF BOBBY L. HARNAGE, SR.

Mr. Chairman and Members of the Committee:

My name is Bobby L. Harnage, Sr. I am the National President of the American Federation of Government Employees (AFGE), AFL-CIO. AFGE represents over 600,000 federal and District of Columbia government employees.

Mr. Chairman, I thank you and your committee for granting me the opportunity to testify today regarding H.R.169, the "Notification and Federal Employee Antidiscrimination and Retaliation Act of 2001". This bill would require that Federal agencies be held accountable for violations of employment discrimination and whistleblower protection laws. AFGE has a long history of active involvement in the fight to protect federal employees from discrimination and against retaliation for whistleblowing actions. AFGE congratulates you for your leadership in offering this legislation to improve agency accountability with respect to whistleblower and discrimination laws.

While we wholeheartedly support the thrust of this bill, AFGE is concerned about possible unintended consequences that could end up hurting the federal employees whom it is designed to protect. Section 3 of the bill requires the amount of any claim, final judgment, award, or compromise settlement paid to any current or former federal employee or applicant in connection with specified antidiscrimination and whistleblower protection proceedings to be reimbursed to the government fund established for such payments out of the operating expenses of the agency to which the discriminatory conduct is attributable.

In order to effectuate its intended purpose, AFGE believes that your bill should be amended to prohibit such agency reimbursement from being paid out of salaries and expense accounts. Salaries and expense accounts should be broadly defined to include salaries, health and retirement, training, childcare subsidies, transportation subsidies, tuition assistance for low income parents—frankly anything that serves to compensate agency employees.

Unless a legislative firewall is designed to prevent antidiscrimination payment reimbursement out of salaries and expense accounts, agencies may be tempted to use those resources to make the payment this bill will require. If so, this bill which is designed to penalize the federal agency would in fact penalize the federal employees.

Mr. Chairman, your bill states the case in one terse sentence in Section 2(2) and I quote it here. "Federal Agencies cannot be run effectively if they practice or tolerate discrimination". The practice of discrimination is invidious and pernicious. The toleration of discrimination in the federal workplace is equally invidious and pernicious and yet more harmful. Continued complacency paves the way for continued evil and has a great cost to our citizens, to our government and to the fabric of our country. Continued complacency provides no incentives for change. Complacency emboldens would be offenders.

Mr. Chairman, your bill breaks the mode of complacency which has become settled in too many areas of our government. Indeed, your bill brings personal responsibility to the federal workplace. The theory underlying his proposal is to create a financial disincentive for discrimination in federal agencies. If agencies have to pay out of their own budgets, agencies will ferret out bad behavior and promote zero tolerance policies regarding discrimination and retaliation against legally protected whistleblower actions. For these reasons, AFGE supports the reporting requirements of Section 5.

Mr. Chairman, discrimination is not an abstract topic, it has human faces on all sides of this abhorrent dynamic. We would like to recommend further steps to help prevent discrimination in the federal workplace. To further promote personal responsibility for discrimination, AFGE proposes adding a sensitivity training section to this bill, which would require managers who are disciplined for discrimination, retaliation, harassment, or any other infractions covered by this bill to attend and participate. Payment of fines is not enough to change behavior. We believe that education and awareness of what constitutes these infractions are important deterrents as well. AFGE has a long history of advocating that those managers who knowingly and blatantly ignore the laws be held accountable for their actions. The most effective deterrent is to direct penalties at those individuals whose actions gave rise to the claim leading to a judgment.

Mr. Chairman, rampant privatization of our federal government is occurring. The federal government appears to be headed in a direction where its function is no more than handing out contracts to vendors. AFGE firmly believes that the anti-discrimination measures in this bill must also be applied to private firms with federal contracts as well. It is time for this government to stop subsidizing the discriminatory actions of the "shadow" government and to prevent what cannot be done directly by federal agencies from being done indirectly by federal contractors. The full faith and credit of the United States government must be granted to those who are employed by entities doing the work of the United States government with federal dollars.

Mr. Chairman, I look forward to working with you on this bill. AFGE fully supports your goal of zero tolerance of discrimination within our government.

I am available for any questions that you and this committee may have for me.

Chairman SENSENBRENNER. Dr. Coleman-Adebayo.

STATEMENT OF MARSHA COLEMAN-ADEBAYO, PRIVATE CITIZEN

Ms. COLEMAN-ADEBAYO. Mr. Chairman, I testify today as a private citizen and not an EPA employee.

Chairman SENSENBRENNER. Would you please—could you please turn the mike on.

Ms. COLEMAN-ADEBAYO. It is on.

Chairman SENSENBRENNER. Then bring it closer to you, because it is not coming through.

Ms. COLEMAN-ADEBAYO. Mr. Chairman, I testify today as a private citizen and not an EPA employee. I thank you for your compliment and unwaiving support for the civil rights of Federal workers. Because of the No FEAR Act, the first civil rights bill of the 21st century, victims of discrimination whistleblowers who have fought this battle on the front lines will experience relief from retaliation. I thank Congresswoman Sheila Jackson Lee for co-sponsoring this bill and for her personal support of victims of discrimination.

Congressman John Conyers, as one of your former constituents, I thank you for your long-term commitment to civil rights. I would also like to thank EPA Administrator Christine Todd Whitman for asking the Department of Justice not to pursue an appeal in my case. I would also like to thank the EPA Victims Against Racial Discrimination, the NAACP Federal task force, and other people

here who have come to support the victims of discrimination. And most importantly, I thank God for this day.

The legislation before you has widespread support from such groups as the NAACP, the EPA Victims Against Racial Discrimination, the No FEAR Coalition, the National Whistleblower Center, and the Southern Christian Leadership Conference, the organization founded by the late Martin Luther King, Jr. These groups support this legislation because it will deter future acts of discrimination and retaliation.

In my situation, a Federal jury found the EPA guilty of discriminating against me on the basis of my race and sex and subjecting me to a hostile work environment. Yet no official action has been taken to hold these officials accountable. As such, these same managers are still in a position of authority to discriminate and retaliate against others.

For instance, since Jon Grand, a senior EPA employee, testified on my behalf during my trial, the same EPA managers have been harassing him by reducing his assignments and damaging his career. Internal discrimination is inextricably linked to government policies and practices as Richard Moore, an environmental justice activist, has stated, you cannot have injustice inside EPA and environmental justice in the community.

Surely before my trial, in an act of retaliation, I was reassigned from my primary duties to a project to provide research in the areas of toxicology and epidemiology. Subjects outside of my area of expertise. I hold a Ph.D. from MIT in international relations. However, in my new assignment, I was to examine among other questions, within 120 days, how many chemical substances are typically in the human body, and what are the primary routes of entry for these chemicals.

I must tell this Committee that I have never taken a course in either toxicology or epidemiology. By retaliating against me, EPA managers placed the American public at risk. But I was only taken off that assignment when Chairman Sensenbrenner wrote to the agency. But how many other employees are being asked to conduct or implement programs outside of their areas of expertise as a result of their retaliation?

The No FEAR Act would require government agencies be held responsible for discrimination—discriminating—against their employees. Some critics question if the concerns of Federal workers for their own dilemma will adversely impact the programs that we serve and create. Dr. King addressed this very concern in his book, *Why We Can't Wait.* Many critics of Dr. King argued that the Civil Rights movement would detract funding and attention from other problems. He wrote, "While the Negro is not so selfish as to stand isolated in his concerns for his own dilemma there is a certain bitter irony in the picture of his country championing freedom in foreign lands and failing to ensure that freedom to 20 million of its own."

Another reason why we must stop this discrimination is that its victims become ill. As a result of stress caused by discrimination that I suffered, I developed hypertension. When I was first diagnosed, my blood pressure was 157 over 117. Which I had been informed could trigger a stroke, a heart attack, or permanent kidney

damage. Yet when my cardiologist wrote four letters to the agency requesting that I be put on work-at-home status so I could avoid the stress caused by a hostile work environment, the request was denied last week. Since the agency disagreed with my doctor's recommendation, the agency hired its own doctor. He never met me or examined me before rendering his decision that I should return to the work environment, immediately.

Within 3 days of my return to the work environment, my blood pressure was elevated 168 over 105. Mr. Chairman, I wish I could tell you that my situation is unusual, but unfortunately this is standard practice. In fact, one of my colleagues who has devoted 25 years to the Federal Government was forced to file an EEOC complaint for accommodations due to his illness as a result of HIV. I believe with the passage of the No FEAR Act, this kind of life-threatening harassment will stop.

The reporting requirement in this act is essential so that Congress may adequately perform its oversight responsibilities. The Federal Government is supposed to set the standard for the rest of the country. It is morally repugnant to treat the just compensations awarded to whistleblowers, and which is part of discrimination, as acceptable collateral damage incurred as the necessary costs of doing business.

In closing, Mr. Chairman, we can no longer live in fear of compromising our health, from the stress created by working in a cruel work environment. We can no longer live in fear of retaliation and out-of-control managers who discriminate without consequences and face no accountability for their actions. We can no longer live in fear of being retaliated against when we courageously expose fraud, waste, abuse and mismanagement in the government. We can no longer live in fear. Mr. Chairman, as victims of discrimination, we have fought a good fight. We have finished the course and we kept the faith. Congress should pass the No FEAR bill. Thank you, Mr. Chairman.

Chairman SENSENBRENNER. Thank you, Dr. Coleman-Adebayo.

[The prepared statement of Marsha Coleman-Adebayo follows:]

PREPARED STATEMENT OF MARSHA COLEMAN-ADEBAYO

Mr. Chairman, I testify today as a private citizen and not an EPA employee.

I thank you for your commitment and unwavering support for the civil and human rights of federal workers. Because of the NO FEAR bill, the first civil rights bill of the 21st Century, both victims of racial, sexual, and hostile work environments, and whistleblowers who have courageously fought this battle on the front lines, will experience relief from daily retaliation. The American public will directly benefit from a system that encourages merit and not cronyism or nepotism. This Bill will ensure that government agencies that discriminate directly pay for their actions and not abdicate or escape their financial obligations. Under the NO FEAR Act, Agencies will directly feel the consequences of discriminating against employees and will, I am confident, devise effective plans to address the problem.

We thank Congresswoman Sheila Jackson Lee for co-sponsoring this Bill and for her personal support of victims of racial and sexual discrimination.

Congressman John Conyers, I thank you for your long-term commitment to human and civil rights. As you know, I was raised in Detroit. You have always provided encouragement for me and my family. In fact, you wrote the recommendation for me to attend both Barnard College and to pursue my doctorate at MIT in the areas of development and African Studies. I enjoyed your mentorship while I was the senior research analyst at the Congressional Black Caucus Foundation and later your advice when I joined the United Nations.

I would also like to thank Governor Whitman for asking the Department of Justice not to pursue an appeal in my case.

Most imporatanly, I thank God for this day.

The EPA Victims Against Racial Discrimination and the No FEAR Coalition strongly endorse this legislation. I am honored to announce that on April 28, 2001 the Executive Board of the Southern Christian Leadership Conference, the organization founded by the late Dr. Martin Luther King, Jr. also voted to endorse this Bill. We are graced by the presence today of Rev. (Dr.) Ruby Moone, Maryland State President of SCLC.

Dr. King in his book, *Why We Can't Wait* addressed critics that charged that the civil rights movement would detract funding and attention from other national concerns: He wrote: "While the Negro is not so selfish as to stand isolated in his concern for his own dilemma, . . . there is a certain bitter irony in the picture of his country championing freedom in foreign lands and failing to ensure that freedom to 20 million of its own." Mr. Chairman, there are those that say that the concern of federal workers for our "own dilemma" should not impact the programs that we serve and create. I believe Dr. King would answer those critics by saying that "injustice anywhere is an affront to justice everywhere".

The 1964 Civil Rights Act must be strengthened to include direct consequences, both financial and personal, for participating in prohibited personal practices such as discrimination.

Although, my case has been widely covered in the media, allow me to summarize my story. I endured five years of racial and sexual discrimination in the EPA Office of International Activities. I was called by derogatory racial epithets and excluded from any possibility of career advancement. When I filed an EEO complaint, I, like so many employees, became the target of daily harassment and unrelenting retaliation. What is not so widely known, however, is that I, like so many other victims of discrimination, became ill in the process of fighting for my civil rights.

On August 18, 2001, a federal jury found the EPA guilty of race, sex, color discrimination and of creating a hostile work environment. However, there is no enforcement of the Code of Conduct and Merit System Principles that outline disciplinary measures and consequences for discrimination and mismanagement. Therefore, these four EPA managers are still conducting US environmental foreign policy as though the complaints of discrimination and the verdict never took place. Sadly, they are now actively harassing a senior EPA staff member who testified on my behalf, Jon Grand. Mr. Grand's assignments have been severely reduced and his career damaged.

Mr. Grand is now being made an example for other employees to ponder the consequences of testifying against the government in a discrimination case. Another subtle message that is being communicated is that managers can survive, even jury verdicts, without fear of career damage. When laws and regulations are not enforced, whether inside the government or in the private sector, the judicial system, the moral fabric of our society, individuals, and the American public suffer.

Retaliation is an ever-present aspect of one's life once you file a complaint of discrimination or when you win a jury verdict. Shortly before my trial, in an act of retaliation, I was re-assigned from my primary duties—during which I received major awards—to a project to provide research in the areas of toxicology and epidemiology. I was to examine among other questions: How many chemical substances are typically in the human body? What are the primary routes of entry for these chemicals? What is the current state of environmental epidimiology? and What are some of the major and ongoing issues in environmental, health and safety fields?.

It is important for this Committee to know that I have never taken a course in either toxicology or epidemiology. EPA managers, in their desperate attempt to retaliate against me for filing a law suit against the Agency, placed the American public at risk by deliberately assigning me work outside of my area of expertise, international relations. Discrimination and retaliation within federal agencies place the American public at risk.

I was only taken off that assignment when Chairman Sensenbrenner, then the Chairman of the House Committee on Science, wrote to the Agency and I publicly disclosed this retaliatory assignment before his Committee. But, how many other employees are being asked to conduct research or implement programs outside of their expertise as a result of retaliatory actions?

Internal discrimination is inextricably linked to government policies and practices. As Richard Moore, an environmental justice activitist has stated, "you can not have injustice inside EPA and environmental justice in the community."

Let there be no confusion, good policymaking, program implementation, or good science cannot co-exist in an environment of chaos caused by any form of discrimination.

Managers need to be sanctioned, including dismissal, when American taxpayers are forced to pay for their mismanagement and prejudice.

Discrimination is a human tragedy that spills over to the public arena. The public suffers because the Agencies are operated by some immoral and unethical managers. Bad managers make poor decisions that result in grave consequences. On the personal level, families are torn apart and left in financial ruin from legal costs. Ultimately, lives and careers are destroyed. Discrimination and corruption in the workplace lead to a lack of competency and poison the environment so that employees fear disagreeing with management paradigm or speaking out about mismanagement. In the end everyone loses, tax payers, the government, and individuals.

An invisible cost of discrimination is that its victims often succumb to illness and even premature death. I would posit that the stressful and hostile environment that Lilian Peasant lived in at the Agency contributed to her early death. In an environment where there is no accountability or consequence for managerial actions—managers literally have the power of life and death. "Power corrupts and absolute power corrupts absolutely."

Once victims of discrimination become ill, the Agency retains "doctors for hire" to overturn the treating physicians recommendation. The goal of the retaliatory acts is to force the employee to choose between their health or their job. Mr. Chairman, this insidious practice, which is both immoral and unconscienable, must be stopped.

On April 30, 2001, I was forced to return to work by my immediate manager against my Cardiologist advice. My Cardiologist had written four letters to the Agency warning them about my medical status. The Agency doctor neither examined me or consulted my physician in making his diagnosis. Within three days of my return to work my blood pressure was elevated to 168 over 105. Elevated levels occured despite my usage of prescibed medication. Prior to be ordered back into the office, my blood pressure was close to normal. By the fourth day, my blood was significantly elevated requiring that I once again work from home. One week prior to my return to EPA headquarters a complete work station had been installed in my home by the Agency. Subsequently, the Agency granted me an additional sixty days to work from home. How many victims are currently enduring such work environments.

I believe with the passage of the NO FEAR Act this kind of life threathening harassment will stop.

Daily exposure to stressful situations compromises life span and quality-of-life. Families and marriages are placed at risk when individuals suffer from daily harassment and discrimination.

A report commissioned by the former Administrator by Holland and Knight, states that EPA's minority and women employees allege that EPA's disciplinary system is discriminatory and flawed, that the Office of Civil Rights is dysfunctional, and that employees are routinely subject to retaliation for raising employment issues. There is a belief, the report offers, even among senior managers, that filing a formal complaint is a career ending action. It is my understanding that the Agency paid this company over $200,000. The EPA Victims Against Racial Discrimination could have provided this infomation to the Agency for free.

However, one useful fact that we learned from this document is that the current average processing time for EPA complaints is 575 days (well over a year and a half) more than 3 times the legally required 180 day processing time for complaints. The government-wide average was 384 days. During the year and a half that employees wait for their complaints to be processed, harassment and retaliation become a fact of life.

Since the Agency is discouraged by the general counsel or Department of Justice from even admitting culpability in discrimination cases, the incentive to admit wrong-doing is wholly lacking.

If EPA's response to environmental emergencies was as slow as its processing time for human and civil rights abuses, the American people would have long ago indicated their displeasure.

To my knowledge, no EPA manager has been disciplied for discrimination, even repeat offenders. In many instances, these managers are rewarded.

Discrimination is clearly evident in the firing practice at EPA. African-Americans account for 18% of those hired at the Agency, in recent years, but 57% of all fired.

The federal government is supposed to set the standard for the rest of the country. When the Federal government ignores its own laws and regulations regarding discrimination, it sets the tone for the rest of the country. With the passage of the NO FEAR bill the government will no longer be able to abdicate its responsibility to seriously deal with the problems of discrimination in the federal sector.

The reporting aspect of this legislation is very important. The primary laws which protect EPA employees who raise concerns about good science or potential public

health issues are contained in six environmental laws, the Clean Air Act, the Solid Waste Disposal Act, the Safe Drinking Water Act, the Water Pollution Control Act, Superfund and the Toxic Substances Control Act. These laws have effectively blocked EPA managers from destroying the careers of scientists who in the past have questioned EPA science. Yet most EPA employees are unaware that this protection exist.

The EPA's own Office of Inspector General issued a report that recommended EPA employees be informed of their rights under the six statutes. Incredibly, EPA officials during the last administration overrode the advice of the OIG and made a decision to continue to deny information about their rights as employee-whistleblowers. Instead of advising employees of their rights under the six environmental statutes, EPA officials removed any mention of the environmental whistleblower protections from the proposed notice, and issued an order which failed to inform employees of their rights under the law. When later questioned about this decision during a hearing before the House Committee on Science, an EPA official stated that the Agency chose not to inform it's employees of their protections under these environmental laws because there is no statute requiring it to do so.

It is morally repugnate to treat the just compensations awarded to African-Americans, women, the disabled and whistleblowers as acceptable collateral damage incurred as the necessary cost of during business.

Mr. Chairman, we can no longer live in fear of compromising our health from the stress created by working in a cruel environment.

- We can no longer live in fear of compromising our families futures and that of our communities.
- We can no longer live in fear of retaliation and out-of-control managers who discriminate without consequences and face no accountability for their actions.
- We can no longer live in fear of being retaliated against when we courageously expose fraud, waste, abuse, and mismanagement in the government.
- We can no longer live in fear of losing our jobs because we refuse to compromise our principles or morals.
- We can no longer live in fear. And, we can no longer wait.

Mr. Chairman, as victims of discrimination, we have fought a good fight, we have finished the course, we have "kept the faith". Congress should pass the NO FEAR bill.

Chairman SENSENBRENNER. The Chair will now recognize Members in the orders in which they have appeared alternately by sides.

The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Morning and thank you, Mr. Chairman. I greet our former colleague Kweisi Mfume and my former constituent, I still thought she was my constituent. You know we have a rule in Detroit once a constituent always a constituent.

Chairman SENSENBRENNER. We will get into that when we examine elections. [Laughter]

Mr. CONYERS. But let's start in Florida first. Now to begin with, I want to commend Chairman Sensenbrenner and I think this is an important investigation, and I am pleased that he's doing that. I would like to observe that you do not have to be a liberal to support fairness in the government or in Civil Rights movement. So if anybody thinks that he's changed his philosophy, I would I would, from personal experience, disabuse one and all from that. But we can work together and so I commend this hearing today. The bill itself responds to a problem about which we can do much more.

I want to create a uniform standard for agencies to discipline managers who have committed illegal discrimination in connection with whistleblower retaliation. We can't do this episodically, one by one, we'll never come out of this in an effective way. We also need

to encourage the use of EEOC-based voluntary alternative dispute resolution at an early stage in the process and to provide for more funding to process the backlog, the huge backlog of cases that exists.

The Judiciary Committee can't do that by itself. We want to examine the standard of proof required to prove illegal conduct and any other disincentive to employees seeking redress of their legal rights. So we're at the beginning. I commend my Chairman for the purpose, for what he's done here in bringing us all together. But it is not the end of the legislative process. And we are going to work together to develop a full and complete response to racism, sexism, illegal retaliation within the Federal Government of all places.

Now, the one thing we can all do from this moment on is make sure that the old reprisal game still isn't being played after a person has complained, been victimized, went to court, won a lawsuit, comes up on the Hill, and they're still coming at her. So we want to put everybody on notice in this one small part of Federal Government, cut it out. Starting now, the next thing we have to acknowledge is that EPA is not alone.

Last week we have just settled a lawsuit involving black agents with guess who? The Federal Bureau of Investigation. And what about the suits against Alcohol Tobacco and Firearms, ATF, Drug Enforcement Administration, Immigration and Naturalization Service, Department of Justice again, Secret Service. It goes on and on.

So this is, as you have said, a common problem that we now have an opportunity, thanks to the creative legislative skills of Chairman Sensenbrenner, to really begin to deal with the whole subject. This cannot be dealt with in the morning with one victim and everybody sympathizing. This is a long entrenched problem.

The Congressional Black Caucus has been working this for 20 years. We have been listening to police and Federal people, marshalls, everybody, it would almost be a shorter list to talk about who hasn't been the victim of a subject of a class action suit.

So this is an important event that we're doing this morning and I want to commend all the witnesses. I look forward to working very much closely with the NAACP as we move forward in this very difficult area. And I thank the Chair.

Chairman SENSENBRENNER. The gentleman's time has expired. The gentleman from Pennsylvania, Mr. Gekas.

Mr. GEKAS. I thank the Chair. I have noted that in the testimony of all four of our witnesses, there was a common theme of approval of the bill with regard to accountability. And Mr. Harnage himself includes in his definition of that accountability some personal responsibility on the part of everyone concerned. And that's important. And this gibes with the President's proposals in various fields up to now, including education reform, and even his tax cut legislation which bring into play particularly the education reform proposal accountability.

That is a strong theme in everything the government does, and all four of you have, in one way or another, endorsed the strengthening of that theme. Kweisi was, I think, absolutely correct in saying that if it's going to happen in the Federal Government where

it should be a model of behavior across the Nation, then we are amiss. And the bill goes a long way as to setting us right in that regard.

Mr. Mihm, I do want to ask one question, the bill calls for, as one of its tenets, requiring annual reports to the Congress on the number and severity, et cetera, you seem—you're in accord with that apparently?

Mr. MIHM. Yes, sir.

Mr. GEKAS. My problem is, I really thought I'm confessing my ignorance that there was a system of reportage, or reporting of these incidents to the Congress. Am I to imply from the—or infer from this provision in the bill and your testimony that this would be a new thing?

Mr. MIHM. There are requirements in place that agencies report data, for example, to EEOC on a variety of matters related to discrimination. The problem is, and this is laid out in our written statement, is that you have a variety of different agencies and different avenues that employees can pursue if they feel they have suffered discrimination, or if they have suffered reprise for whistleblowing. These different avenues don't report in consistent ways with consistent time frames with consistent definitions. Basically, sir, what you have, you have a patchwork of different requirements and agencies dealing with employee protection for discrimination and reprisal that don't all come together to allow us to have a unified, comprehensive picture of the amount of discrimination and reprisal and the outcomes of those cases.

So that's one big structural problem. Second, you also have longstanding problems that EEOC has had in getting good information out of the agencies. And EEOC has an initiative underway that is designed to improve the information it gets from agencies, but basically, they have had problems getting data from agencies in the right format that would allow for a targeting and an analysis of really what's going on in terms of employee discrimination. So you have basically those two different problems.

Mr. GEKAS. What is notable about that testimony and the correlation is that we cannot have good accountability, strong accountability, unless we have the data that goes with it.

Mr. MIHM. Absolutely.

Mr. GEKAS. So this bill marries those two concepts.

Mr. MIHM. You cannot make progress unless you know what's going on.

Mr. GEKAS. Kweisi, I have notified the Speaker of the House that if he runs out of replacements for the gavel on a given day, that he's to call upon you and that you will rush over to temporarily gavel us down as we need it. Are you willing to serve?

Mr. MFUME. I'm willing to serve. I am assured it will be a news story that we will have to respond to. But it was my pleasure to serve as Speaker pro tem.

Mr. GEKAS. Yes, we admired your service in that term.

No further questions and I yield back my time.

Chairman SENSENBRENNER. Just for the record the Congress does not require the Speaker of the House to be a Member. The gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. Let me add my appreciation for the expeditiousness in which this legislation has come to a hearing now in the Judiciary Committee. Let me acknowledge all of the witnesses for your eloquence, and as well, your commitment. Obviously, Mr. Mfume, let me thank you for the pivotal role that the NAACP, the Southern Christian Leadership Conference, and the coordination of those of you who have constantly put yourselves on the front line, both in terms of the energy and work, but also in terms of the intellect. I think the research that the NAACP offers is outstanding.

Chairman Sensenbrenner has been at the forefront and I appreciate that. We have been able to collaborate both in terms of the rightness of this position but also on the passion about this issue. I would offer to that that in paraphrasing Dr. King's words, since my very, if you will, long-standing heroine, Dr. Coleman-Adebayo, has withstood all of this.

"Discrimination anywhere is discrimination everywhere." And I believe what we are doing today, as I look at the audience, and is similar to some of the challenges that we have been given over the years, and the challenges that some day we shall overcome. This particular legislative initiative, and I appreciate the testimony of all of the witnesses, and I will recount for some and I will have a question within the 5-minute time frame, but this is a legislative initiative that I think will set the tone for what is still happening in America, in the workplace and in corporate America in the private sector.

And I am reminded—I had—of the role of the Federal Government throughout the Civil Rights era. It was always that institution during a period of time that was looked to to come to save the day—whether it was the FBI during the civil rights activities of the deep south, whether it was the Department of Justice in conjunction with so many of our civil rights organizations.

And so now, as we look to tell the world that discrimination is still about, and how do we correct it, it certainly must start with the Federal Government. And it includes those who would have offered themselves to testify on behalf of the discriminated, and certainly in the instance of the EPA, and I am gratified that you have mentioned the EPA Administrator that we worked very hard for this to be understood, that this was not personal, but this was real, that we could not accept that the head was against it. If the tentacles, the management, was still confining.

So I think it's important to note several elements that we have, and I would like to just recount them for you. And that is that we notify Federal employees now of their rights.

Isn't that interesting? Many did not know that we require the annual reports that the GAO has said are so crucial and that we penalize the specific Federal agency for its discriminatory practices, notice of a punitive nature for that. And I think that is extremely important to be able to set the tone. I might say to our good friends in AFGE, I have listened to you, I look forward to working with you on that issue. And I thank you for your leadership.

Let me ask two questions to Mr. Mfume, and, of course, to Dr. Coleman-Adebayo.

Mr. Mfume, as it relates to your history in Congress, but as well, as you have seen the atmosphere that we're now in, this might be characterized as overkill. You have civil rights laws, you have the EEOC. What is your firsthand practical experience of the necessity of this legislation, and I do thank you for your testimony. And then to the good doctor, I understand that you, and I appreciate you being a private citizen at this point, but that you are under a doctor's care, it is difficult for you to return at this time. And I would like you to explain that further about your physical condition, if you don't mind, to allow the Members to hear the extreme conditions that you are working under and you are symbolic of many who are in this room who have worked under very extreme conditions, including whistleblowers and those who have helped in cases like this.

Mr. Mfume.

Mr. MFUME. Thank you very much, Ms. Jackson Lee. And in your absence, I took time to note our sincere appreciation for your sponsorship of this bill, both you and the Chairman, and for the leadership you provided. I believe that as long as we have discrimination of any type in our workplace, that one cannot really be accused of overkill, except to assume that our job is not to get rid of it. And I think that our job really is.

At the NAACP we carry a little basic philosophy with respect to the sort of discrimination that takes place in our society, and we note that while we look at this bill as a first step, we recognize as someone said earlier, that episodically we have got to find a way to get beyond and step here and step there. We really need to comes to grips with this entire problem.

We believe that racism, sexism, anti-Semitism are wrong. That black bigotry is just as cruel and evil as white bigotry. That immigrant bashing, union bashing, gay bashing and city bashing deplete us as a Nation. For the Federal employee, it is a deeper understanding of what the problem is, however, because they understand that Jim Crowe, Sr. is dead, but Jim Crow, Jr. is alive and well and oftentimes in Federal workplaces, creating situations—threatening people, intimidating individuals because of their race, because of the way they worship, because of what their sexual orientation may be, because of what their surname is.

All of those things are wrong. And the worst part of all of this is, as I said in my testimony, there are so many individuals who are white, both men and women, who are seeking to uphold the law with respect to antidiscrimination and existing Federal regulations, and they themselves find that they are the victims of some sort of campaign to further intimidate them for carrying out the law.

Mr. MFUME. So I don't think we could ever be accused of overkill when we are attempting to get rid of a monster such as discrimination.

Ms. JACKSON LEE. Dr. Coleman-Adebayo.

Ms. COLEMAN-ADEBAYO. Thank you.

One of the reasons why I decided to disclose something that I think is so very personal—and for me this was, I must admit, very difficult because I tend to be a very private person—but what has—what I think—one of the issues that I think has become very

close to my heart is the fact that when people think of discrimination, particularly in the Federal sector, most people think that Federal employees are essentially looking for higher promotions, and we are, and better benefits, and that's also true. But one of the real issues of discrimination is that people become ill and some people die in the process of fighting this battle.

I have seen it over and over again, that this is really a life-and-death struggle in the Federal Government. People are trying to support their families, people are trying to raise their children, and the Federal Government offers some framework for doing those kinds of activities. But in that framework there is a certain cruelty that is attached to it, and that is that sometimes people have to make the ultimate sacrifice, and that should not be the case in the Federal Government.

The other day—on August 28th, to give you a very extreme example, a colleague of ours, Ron Isler, died. He had written to his manager, and he said at the end of his memo that he sent to some of his colleagues, "As I have requested during several of our meetings″—and he lists the dates—″to be removed from ongoing negative racial and harassing environments in OMA and that to date no relief has occurred." .

Well, he passed away very recently. I said August, but it was, I think, maybe April 18th, if I'm correct, April 18th. I apologize.

So I think it's important for this Committee to know that we're really dealing with survival issues here. We're dealing with issues of life and death and that people are literally being stressed out of their physical existence because of the discrimination.

Now, I know that this kind of discrimination is much more exotic when it's a hanging or when it's someone being dragged by a truck, but I'm telling you hypertension and stress and blood pressure and cancer kills just as well as those other kinds of activities. So we've got to get to the heart of discrimination because it's costing people their lives.

Thank you.

Chairman SENSENBRENNER. The gentlewoman's time has expired.

The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. Thank you, Mr. Chairman.

Mr. Mfume, good to have you back on the Hill.

Good to have all four of you as panelists this morning.

As the gentlelady from Texas said, Mr. Chairman, you have been on the forefront of this issue, and I commend you for that. I thank you for having scheduled this hearing today.

Mr. Mfume, you just pointed out, I think, no race has a corner on the bigot market. And I think when bigotry is practiced it's equally onerous, whether blacks, white, yellow or tan are guilty. Fortunately, I think most of us are not, but the few who are—strike that—maybe more than a few, those who are, are the ones who are heard most consistently, and that's what we're trying to address this morning, I think.

Mr. Harnage, let me ask you a question. How many Federal employees are nonunion? Or would it be easier to answer how many Federal employees are affiliated with the union?

Mr. HARNAGE. The Federal Government is somewhere in the neighborhood of 75 to 80 percent unionized.

Mr. COBLE. Okay. So the obvious majority of Federal employees are unionized. Would the unions be responsible or should the unions be responsible for protecting the rights of their members in situations like we're discussing here, A; and, B, has your union been involved in some of these situations that we've just discussed this morning?

Mr. HARNAGE. Yes, sir, we have. In fact, I believe we're the only union that has on its National Executive Council an elected member that is over what we call the Women's and Fair Practice Department to make sure that we, as unionists, are sensitive to the problems of discrimination as well as offering assistance to our members who are encountering those types of problems. We handle many discrimination cases, yes.

Mr. COBLE. Go into a little more detail. To what extent do you think that the union should be responsible?

Mr. HARNAGE. We should be as responsible as the law will allow us to be, and we should be as responsible as the employee wants us to be. In a lot of cases, we do allow binding arbitration as a proceeding to try and expedite the EEO process. The EEO process, in my opinion, is designed to wear the individual down and have them give up before they ever get any justice; and so we do offer that to them. But they have the—since there is the statutory appeal rights they have the right to go out and hire their own attorneys and sometimes follow a different route than the union contract.

Mr. COBLE. Assuming that the employee involved would want your assistance, do you feel like you have been afforded an open door or do you think there has been frustration or maybe both?

Mr. HARNAGE. Anybody that says there is not frustration in trying to process an EEO complaint has never processed one before. I don't care how good we may think we've got it, it's still very frustrating and very time consuming in trying to get it to a final decision.

Mr. COBLE. I thank you again, panelists.

Mr. Chairman, I yield back my time.

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

I would like to thank our witnesses for appearing today, particularly our former colleague, Mr. Mfume.

I would like to ask a couple of questions.

Most of the major part of the bill requires the funding for the suits not to be easier for the agency if they drag it out to litigation rather than settle. If it's settled, it's out of their budget. If it's litigated, it's out of somebody else's budget. It makes sense to remove the disincentive. My question is whether or not that disincentive is better removed by having all of the settlements paid out of the judgment fund and none of it out of the agency. If it's out of the agency fund, they obviously have an incentive to fight it to save their agency budget.

Mr. MFUME. Well, I've got kind of mixed feelings on that, and I would offer one word of caution. One of the things that concerns us at the NAACP is that, no matter how well-intentioned this legis-

lation is, there may be individuals who now or conceivably later in the future might head an agency of the government who might say, well, you know, I don't want this out of my budget, and so I'm going to send this over to the Justice Department and hope that they play with it for 3 or 4 years, because then I'll be off doing something else. That's the one caution I would offer here.

With respect to whether it's paid out of one account or another, I heard the concerns that were expressed earlier with respect to payroll accounts. I would strongly urge that the money not come out of payroll accounts. But my fear is that if it is only coming out of the justice account then conceivably, again, there may not be the incentive that I think Mr. Sensenbrenner, Ms. Jackson Lee wanted, the kind of pressured incentive back on the agency to realize they will be punished in a very real way with respect to their budget. So I think it's one of the things that we have got to settle on as we go forward.

As I said, I have mixed emotions. I am very strong, however, about the efforts that some might try to employ to skirt the intent of the bill. I would offer, again, my objection, as was stated earlier, to any money coming out of payroll accounts specifically that would hurt employees.

Mr. SCOTT. You in your testimony refer to this as a positive step. I assume you don't mean by that it's a solution. Does the NAACP have a proposal on burden of proof, sanctions against those that discriminate and more funding for EEOC as additional steps that need to be taken?

Mr. MFUME. We do; and I'm glad you asked that.

As I referenced earlier, seated behind me is Leroy Warren, a member of our national board, who has led our efforts through this task force the last 3 years. There have been a number of other things that have been developed.

This is a positive step, but, in saying it's a step, we should point out it's a first step. There are many others that really have to follow because of the endemic and systemic nature of discrimination in our government, and those ideas that you raised are issues that we have proffered as things that we think are very important to be continued with. We urge additional legislation, additional legislative activity to put in place those additional safeguards; and we would hope that, in moving this bill forward, that as people look at this issue they recognize that this is a beginning and that there is a lot more to be done to protect Federal employees.

Mr. SCOTT. Are you concerned about the acronym for the bill?

Mr. MFUME. I hadn't really thought about that. I need to know if your aspect comes from the whistle-blower protections that are part of it. I'm not particularly concerned with it, but we'll give it some more thought now that you have raised the issue.

Mr. SCOTT. I will yield the balance of my time to the gentleman from Michigan.

Mr. CONYERS. Thank the gentleman from Virginia.

I wanted to thank Mr. Warren, too, for doing a good job on the task force as chairman of the Federal sector task force.

But, Dr. Coleman-Adebayo, let's put this on the table. You're trying to retire or are you? Or do you want to discuss it? You don't have to. But, I mean, we don't want to leave here with some secret

stuff going on in EPA that we didn't know at the hearing. Now, you can come back to work, you can work at home, you're eligible for a retirement. Those are simple options that everybody has.

Ms. COLEMAN-ADEBAYO. Thank you, Mr. Conyers. I actually hadn't planned for that question to be raised at this hearing, so I have to think about that.

Chairman SENSENBRENNER. You don't have to answer it if you don't want to.

Ms. COLEMAN-ADEBAYO. Let my say I have only worked for the Federal Government for 10 years which, in many ways, I think, informs a lot of my discussion around this issue. Because, unlike many people that I've met in the Federal Government who have spent their entire career in the Federal Government, I have actually seen different systems at work in different places. So when I came to the Federal Government, I was really astounded by the openness of the discrimination in the Federal sector.

I think one of the reasons why you find me so passionate about this issue is not only because I have been a personal victim of it, but, because many of us have benefited so deeply from the civil rights movement that when we're confronted with this kind of racism and sexism we feel that there is a real obligation, as the next generation, to really do something about it. So my passion for this issue isn't as much personal as it is almost generational, because I'm also a mother, and I cannot imagine my children coming home to me in 10 or 20 years and describing the same experiences that I've had.

Mr. CONYERS. Well, thank you. Just put in your notebook Conyers is not prying, he's protecting.

Ms. COLEMAN-ADEBAYO. You have been doing that for me for a very long time. So I thank you very much, Mr. Conyers.

Chairman SENSENBRENNER. I have one question. Mr. Mihm, I have noticed that the law does not allow the Postal Service to dip into the Justice Department, government, or judgment fund when they have to pay judgments or settlements as a result of discrimination or retaliation. To your knowledge, has that impacted upon the ability of the Postal Service to function properly because they have to pay these judgments out of their own funds?

Mr. MIHM. We haven't heard problems to that effect at the Postal Service, Mr. Chairman. We've checked over there, in fact, as recently as yesterday afternoon where we were trying to make calls over there to find out and get some information on this. But I haven't heard anything where it would cause a problem for them in this regard.

Chairman SENSENBRENNER. You think you can stipulate that the postage rate increase they voted yesterday is not being used to pay judgments?

Mr. MIHM. We'll supply that for the record, if we may, Mr. Chairman. No.

Chairman SENSENBRENNER. You may.

Mr. MIHM. Thank you.

[The information referred to follows in the Appendix]

Chairman SENSENBRENNER. Well, I would like to thank all of the witnesses.

Ms. JACKSON LEE. May I have another question, please.

Chairman SENSENBRENNER. We're about ready to get to a vote. I want to say something.

Ms. JACKSON LEE. All right. Please do.

Chairman SENSENBRENNER. First of all, let me thank the witnesses for their very insightful testimony in pointing out for the record and for the public how pervasive and extensive discrimination and retaliation are in the Federal Government and the need for this bill. I recognize that this bill is not a panacea, but it's a start; and I would like to make the observation that we should not fall into the trap of the perfect being the enemy of the good.

When this bill was introduced, it was referred to four committees, including this one. I deliberately redrafted the bill so that it would fall in part in the jurisdiction of the Judiciary Committee so that I could have this hearing, and let me give all of you a commitment that there will be a prompt markup in this Committee so that we can file a committee report and keep the momentum going in favor of it.

However, the bill is before the Government Reform, Energy and Commerce and Transportation and Infrastructure Committees; and this Committee is a pushover compared to the other three. So I would just like to advise everybody that in—sometimes in this instance trying to ask for too much might end up preventing us from taking the first step.

Representative Jackson Lee, I think, has correctly pointed out that the notices are not as broad as they should be there, that all anti-discrimination laws are not covered by this bill. When we do mark up the legislation, I intend to propose a manager's amendment to broaden the scope of the bill to include all anti-discrimination laws being a part of the notice so that nobody can make the excuse, well, I read that poster on the bulletin board, and it didn't say that, so I didn't know this was something that was prohibited, even though common sense would probably have everybody reach that conclusion.

So, again, I thank everybody for coming and participating in this hearing. This is a first step in a long process. I will do my best to keep the momentum going on this bill and also to try to get the message to the other committees that this is an important bill and they should not ignore this issue.

Because the sooner we address this issue, the better the morale will be in the Federal work force. Everybody knows that productivity and high morale are one and the same; and if there is low morale, the productivity goes down and the taxpayers aren't getting their money's worth. So we can give the taxpayers more of their money's worth from people who are in the Federal work force by getting this bill passed and hopefully reducing discrimination and retaliation.

The gentlewoman from Texas.

Ms. JACKSON LEE. I thank the Chairman very much.

First of all, let me thank you for that expanse of the manager's amendment. I appreciate it very, very much.

I just wanted to, one, Mr. Chairman, ask that my statement be submitted in the record.

Chairman SENSENBRENNER. Blanket permission was given at the beginning of the hearing for all statements to be included in the record.

Ms. JACKSON LEE. Thank you, Mr. Chairman.

I just wanted to pointedly try to ask Dr. Coleman-Adebayo about her medical condition with the cardiologist, just for the record. I thank the Chairman and Ranking Member Conyers—and let me thank him for his leadership and working with Chairman Sensenbrenner—I think this is a dynamic duo on this particular legislation. But your particular circumstance, please, so we can know.

I will conclude by simply saying that the Chairman is right. I thank him for his expediency. Let us not be silenced as it relates to our other friends on other committees. Let us work with them so we can move this along rather quickly along with the administration.

Dr. Coleman, if you would. Thank you very much.

Thank you, Mr. Chairman, for this hearing.

Chairman SENSENBRENNER. Dr. Coleman, do you want to elaborate on this?

Ms. COLEMAN-ADEBAYO. Certainly I can. I certainly thank Congresswoman Sheila Jackson Lee and Congressman Conyers for their concern, and I'm sure all the members here and my colleagues here. So I thank you very much.

At this point, my doctor has actually doubled the medication. I was actually forced to return to my office, let me back up and just say that on November 17th, by my managers, because of the harassment that I was subjected to in the office, my blood pressure went into astronomical numbers, and my doctor pulled me out of the workplace at that point.

My managers worked diligently to force me back into the workplace. I think it was a very conscious effort, and I think that we cannot underestimate just how conscious the discrimination is, and it's also very surgical. They find out that there is a weakness, whether it's a physical or mental weakness, and they really begin to target those areas. So this is very conscious and deliberate discrimination.

When my doctor would not relent in terms of his decision, the agency actually hired—we call them doctors-for-hire—they actually hired a doctor to contradict my doctor's orders. That became the agency's own decision-making doctor of record. So the only doctor that the agency listens to is the doctor that they paid for. And so that doctor at that point instructed the agency to have me return to work over my treating physician. So I've never seen this doctor. He has never taken my blood pressure. I have no idea who he is. But he made this life-and-death decision for me.

So last Monday—not this Monday but the previous Monday, I was actually forced to go back into the office or else I would have been considered AWOL. So after 3 days my blood pressure escalated, as my own treating physician said that it would, and in 2 days I was—my doctor told me that I should essentially go home because my blood pressure was too high.

So these are very, very serious problems; and I raise that because in my last testimony, in October, I discussed a woman named Lillian Peasant who had died from hypertension. And my sense is

that—and I don't have any records on this, but I wouldn't be surprised if her doctor had also sent in letters saying that she shouldn't be in the workplace and the agency ignored those letters. [Laughter]

So, you know, let me just say that we talk about these macro concepts of discrimination, but, we really have to talk about the people who are being discriminated against. And those are the people like Anita Nickens, Phil Newsome and Cathy Harris who have really suffered because of this process. So, one of the reasons why we're supporting this bill, so much, is because we believe that this will really save lives.

Thank you.

Chairman SENSENBRENNER. Thank you very much.

Mr. Conyers would like to have a picture taken before we have to run over and vote.

So there being no further business—.

Mr. SCOTT. I have a unanimous consent request.

Chairman SENSENBRENNER. Would the gentleman state it?

Mr. SCOTT. The acronym of the bill is very similar to the acronym of another organization. I would like unanimous consent to introduce for the record the welcome page of that organization so that, as you redo the bill, we may consider changing the acronym so as not to confuse.

Chairman SENSENBRENNER. I see what the gentleman wants to put in, and I don't think that that's relevant. It's a page from David Duke's home page. You know there is no intention in making the acronym of this bill to be any way supportive of this man who, I would point out, has been kicked out of the Republican party.

Mr. SCOTT. I think we should note for the record that the name of the organization is N.O.F.E.A.R.—N-O-F-E-A-R.

Chairman SENSENBRENNER. Yes, well, I think the acronym of the bill was to try to prevent fear in these rather than having anything to do with European American rights.

Again, I will make the statement very clearly that the No FEAR acronym was done, you know, completely without the knowledge of what Mr. Duke is up to—and, frankly, I don't care what he's up to.

There being no further business to come before the Committee, the Committee stands adjourned.

[Whereupon, at 11:33 a.m., the Committee was adjourned.]

APPENDIX

STATEMENTS SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Let me state at the outset that I agree with Chairman Sensenbrenner that discrimination and whistle blower retaliation are pervasive in our federal agencies and mandates Congressional attention.

One does not have to look very hard to find examples of government misconduct. We all remember the infamous tailhook scandal, when women in our armed forces were forced to endure outrageous sexual taunting.

And of course, there was the notorious "good old boys" round up at the ATF, when racial slurs and race baiting were in full display by our law enforcement. None of us were surprised when the ATF was forced in 1996 to settle a class action lawsuit paying 241 current and former black ATF agents in excess of $4.6 million in damages for illegally discriminating in its promotion practices.

Then in 1998, a District of Columbia Federal jury found that the Department of Justice—the supposed protector of our civil rights—had illegally discriminated against Matthew Fogg, and awarded him $4-million in damages, the largest monetary award ever awarded to a single Federal employee.

And last year a D.C. court found that the EPA had illegally discriminated against Dr. Marsha Coleman-Adebayo on account of her race and sex to the tune of $600,000.

And these are not isolated instances. Last year alone, federal employees filed more than 24,000 discrimination complaints against their agencies. And they were forced to pay a total of $26 million for discrimination complaint settlements and judgments. The complaint process is so backlogged that on average a discrimination takes more than 1,100 days to process.

I would have liked to think that our *federal agencies would be the models for the treatment of employees in America. But these figures indicate beyond a shadow of a doubt that the agencies are miserably falling short of this responsibility.*

I believe H.R. 169 is inadequate in and of itself to respond to this ubiquitous problem, and that we can and must do much more. Among other things, I believe we should *create a uniform standard for agencies to discipline managers who have committed illegal discrimination or whistle blower retaliation. We also need to encourage the use of EEOC-based voluntary alternative dispute resolution at an early stage in the process, and provide more funding to process the backlog of complaints. We also need to examine the standard of proof required to prove illegal conduct, and any other disincentives to employees seeking redress of their legal rights.*

We are at the beginning, not the end of the legislative process. And I look forward to working with the Chairman in developing a full and complete response to this racism, sexism, and illegal retaliation by our own government.

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Chairman Sensenbrenner and Ranking Member Conyers thank you for this opportunity to address job discrimination in the federal government. Chairman Sensenbrenner, I would like to commend you and thank you for allowing me to join with you in this effort to fight on the job discrimination in the federal workplace.

We began this effort last Congress with hearings under the jurisdiction of the House Science Committee, which you chaired. Today, this effort continues in the 107th Congress in the form of H.R. 169, which has been dubbed the "the first civil rights legislation of the 21st Century." However, I would only say that it is an at-

tempt to reintroduce the subject of civil rights to the House Judiciary Committee after much too long an absence.

I would also like to thank the members of the panel and all the courageous individuals and organizations, which have spoken out on the need for this legislation, including the NAACP Task Force on Federal Sector Discrimination and other civil rights organizations.

Mr. Chairman, I am in support of this bill for the very reason so many find it controversial, the federal government should be the working example of the Constitutional values our democracy upholds. Unfortunately, the civil rights regulations and worker rights regulations that government the federal workplace has not brought about a commitment to equality and fairness in the workplace. Some how a disconnect has developed between, what the federal government says is right, just and fair in the workplace, and what it actually practices.

It is my believe, that the cost of practicing discrimination in the federal workplace does not carry sufficient penalty for the abuser because their actions even when proven through court action can still be hidden. It is possible to hide discrimination in the federal workplace because no one is held accountable to victims, Congress, or taxpayers.

I am a sponsor of this legislation because it will begin the process of creating accountability in the federal workplace as it relates to discrimination and intolerance. It is my hope that what has not been achieved through training and policy directives regarding fairness in the federal workplace may be achieved through the requirements suggested by the legislation.

Career federal employees cannot have a comfort level regarding discriminatory action that they might engage in, but remain mindful that the behavior will become part of their work history with the federal government.

Although the work that prompted the creation of the No Fear Act was based on disturbing allegations that the Environmental Protection Agency (EPA). My thanks and appreciation are extended to Dr. Marsha Coleman-Adebayo for her willingness to share her story regarding discrimination and retaliation at the EPA. Her testimony told not only her story, but the story of thousands of former, and current federal employees throughout the government who have had to work in hostile work environments without any lifeline to guide them to assistance and support to challenge their work conditions.

It has been alleged that other agencies: Department of Agriculture, Department of Justice, Department of Treasury and other agencies have had to struggle with overt and covert practices of intolerance, discrimination, and retaliation against their employees.

Further, this legislation would allow those employees who feel that a wrong is being committed by an agency to become whistleblowers with greater protection being provided to them by this bill should it become law.

The work on this legislation began in the House Science Committee when a hearing was held in March 2000, over allegations that agency officials were intimidating EPA scientists and harassing private citizens who publicly voiced concerns about agency policies and science. During these proceedings, a number of African-American and disabled employees expressed similar concerns.

Under the Civil Rights Act of 1964, it is illegal to discriminate against federal employees on the basis of race, color, sex, religion, national origin, age, or disability. In addition federal employees are protected from retaliation for filing complaints related to such discrimination as whistleblowers. Federal whistleblowers may file reprisal complaints with the Office of Special Counsel ("OSC"), the Merit Systems Protection Board ("MSPB"), and the Department of Labor's Occupational Safety and Health Administration ("OSHA"). Federal whistleblowers are protected under several federal laws, the primary one being the Whistleblower Protection Act of 1989.

One of the aggrieved employees of the EPA, Dr. Marsha Coleman-Adebayo, won a $600,000 jury decision against EPA for race and sex discrimination under Title VII of the Civil Rights Act of 1964. Furthermore, it is alleged that the EPA has sought to retaliate against some of the employees and scientists that assisted the Science Committee during its investigation by reassigning the employees to other positions and transferring them to other offices. This is a very serious matter of discrimination, and of obstructing justice.

Mr. Chairman, since its introduction in the 106th Congress as H.R. 5516, the Notification and Federal Employee Anti-discrimination And Retaliation Act (No FEAR Act) of 2000, has stood for the principle that federal employees should have "no fear" in reporting discriminatory behavior by their federal agency employers. Like its predecessor, the legislation before us today, H.R. 169, demands that agencies be held accountable for their misdeeds, but H.R 169 expands accountability throughout the entire Federal Government.

Under current law, agencies are not held liable when they lose judgements, awards or compromise settlements in whistleblower and discrimination cases. The Federal Government pays such awards out of a government-wide judgement fund. The No FEAR Act would require agencies to pay for their misdeeds and mismanagement out of their own budgets, as an incentive to scrupulously comply with non-discrimination laws and policies, and to comply with internal administrative process protocol. This makes good sense.

The bill would also require Federal agencies to notify employees about any applicable discrimination and whistleblower protection laws and report to Congress and the Attorney General on the number of discrimination and whistleblower cases within each agency. Additionally, each agency would have to report on the total cost of all whistleblower and discrimination judgements or settlements involving the agency. In all, this bill would make our agencies more accountable by creating incentives for them to monitor themselves.

We must not lose sight of the fact that discrimination and intimidation in the workplace does not just exact a professional development toll, it also creates psychological wounds, and physical illness that diminish the health of the employee being abused. It also efforts the productivity of the workplace and is harmful to the best interest of the federal government in the pursuit of the work that the agency is charged with by Congressional authority.

I believe that it is time for the Congress to state in no uncertain terms that discrimination and intolerance in the federal workplace will not be tolerated.

Mr. Chairman, we have come a long way towards eliminating the culture of discrimination and harassment that exists in our federal workplace. This legislation takes us one step further towards our goal of equal justice and accountability under the law.

Thank you.

PREPARED STATEMENT OF JOHN E. BERTHOUD, PH.D.

The National Taxpayers Union and its 300,000 members strongly support the passage of H. R. 169, the "Notification and Federal Employee Anti-discrimination and Retaliation Act of 2001" (No FEAR Act). This legislation, which has been introduced by Representative Sensenbrenner, will provide for a more responsible and accountable federal government, which translates into big savings for taxpayers.

Under current law, federal agencies found guilty in discrimination and whistleblower cases are not required to pay for their own mistakes. Instead, awards and settlements are paid out of a separate government (and taxpayer-funded) judgement account. The No FEAR Act will hold individual government agencies financially responsible for judgements they lose by requiring that financial settlements be taken from a particular agency's budget, rather than using a slush fund of taxpayers' money.

By attacking the purse strings of these offending government agencies, the No FEAR Act can create a more fiscally responsible federal government. Agencies will now have to act more responsibly or else risk serious financial consequences.

The No FEAR Act will not only make agencies more financially accountable, but it will create incentives to improve relations with workers. This is good news for the workers as they shouldn't have to tolerate discrimination or face retribution for whistle-blowing. This is also good news for taxpayers. An unhappy federal workforce makes for less efficient and more expensive government. And federal employees should never feel intimidated to step forward and expose waste, fraud or abuse where they see it occurring.

The No FEAR Act promotes the virtues of fiscal responsibility and accountability in government, and the National Taxpayers Union urges Congress to enact this legislation.

PREPARED STATEMENT OF THOMAS DEVINE

Thank you for inviting written testimony from the Government Accountability Project ("GAP") on H.R. 169, the Notification and Federal Employee Anti-Discrimination Act. It is an essential building block for federal employee rights in reality to reflect the rhetoric of merit system principles.

GAP is a non-profit, nonpartisan public interest law firm that specializes in protection for genuine whistleblowers, employees who exercise free speech rights to challenge institutional illegality, abuse of power or other betrayals of the public trust they learn of or witness on the job. GAP has led the public campaigns for passage of the Whistleblower Protection Act of 1989 ("WPA")(federal employees); Mili-

tary Whistleblower Protection Act (armed services members); numerous related statutes for private industry sectors such as nuclear weapons and nuclear power; and numerous state whistleblower laws. We also have published numerous law reviews on the provisions and impact of these laws, as well as *The Whistleblowers Survival Guide: Courage Without Martyrdom*, the lessons learned from over 2000 cases during our first two decades.

We are especially pleased to review a bill that addresses the civil service impact of discrimination on a holistic basis, rather than fragmenting Equal Employment Opportunity ("EEO") and whistleblower violations. In our experience, simultaneous intolerance for both EEO and whistleblower rights coexists as the rule, not the exception. Abuse of power seldom is limited to one merit system category or the other.

GAP commonly represents whistleblowers dissenting against racial and sexual bigotry. For example, Customs Inspectors personified by Cathy Harris in Atlanta blew the whistle on arbitrarily detaining black women up to four days in alleged drug searches, going beyond privacy violations to strip them of human dignity. They were held incommunicado, barred from contacting either family or counsel. Without any evidence to justify the searches and regularly without anything to show for it, the government agents systematically groped all body organs within physical grasp, and subjected them to hospital laboratory tests for all the rest. Whistleblowing on civil rights violations can make a difference. Thanks to the courage of public servants like Ms. Harris, the agency modified its policies. Now random suspects can only be held incommunicado for four hours, instead of four days.

Federal employees should appreciate three significant concepts in H.R. 169 that are necessary to fill merit system gaps. Most fundamentally, the bill requires collection of data on disputes alleging violations of employee rights law, including discipline of offending agency officials. As the General Accounting Office ("GAO") confirmed in its testimony, that data simply does not exist on a systematic level. Based on our own research, we also can confirm an analogous vacuum of statistical data for decisions on the merits of whistleblower rights. This includes Whistleblower Protection Act (WPA) cases adjudicated by the Merit Systems Protection Board and labor-management arbitrators, as well as witness protection statutes administered by the Department of Labor. We recommend a provision specifying that the new pool of mandatory statistical data include the results of all employee protection statutes, specifically disclosing won-loss records on the merits.

Second, the law requires agencies to post employee rights. As the U.S. Office of Special Counsel reported and the GAO confirmed, agency heads have not respected the mandate of 1994 amendments to the Whistleblower Protection Act, holding them responsible to educate all staff of their duties and rights under these good government laws. We recommend that the bill extend mandatory notification to include mandatory training on implementation of covered statutes. This investment will pay for itself by preventing avoidable litigation.

The third reform concept is the most significant—establishing institutional accountability. Under H.R. 169, agencies would have to pay for relief to compensate victims of merit system violations. Today the costs generally are paid by a Judgment Fund for the entire Executive branch, without affecting individual agency budgets. That means agencies have nothing to lose from discrimination or free speech repression. By imposing liability, H.R. 169 would create an institutional deterrent effect to prevent merit system abuses.

We recommend fine tuning the bill, however, to prevent agencies from punishing all employees when compensating for violations of individual rights. Some organizations have expressed concern that financial penalties will be financed by cutting bread and butter benefits, or funding for programs to implement and administer the merit system. The bill should outlaw this tactic wherever it can be proven. Most significant, the bill can structurally prevent vulnerability by restoring personal accountability that has largely vanished since passage of the Civil Service Reform Act of 1978. Today bureaucratic bullies also have almost nothing to lose on the personal level by doing the dirty work of retaliating against minorities, women and whistleblowers. In fact, they frequently receive cash awards in the aftermath of serving as hatchetpeople to harass whistleblowers. H.R. 169 will be much more significant if it is financed through personal, rather than institutional liability.

Finally, we have two structural suggestions. H.R. 169 is necessary, but not sufficient for merit systems rights to regain legitimacy. First, we agree with the American Federation of Government Employees that merit system rights should be extended to government contractor employees. All too often, contracting out government functions means canceling employee rights. The primary reason for the merit system is protecting the public. It should apply wherever taxpayer funds are spent for public service.

Most fundamental, Congress must restore a fighting chance for employees to win when they assert merit system rights. As summarized in the attached April 5 open letter from six good government organizations to the President and a corresponding April 30 *Washington Times* editorial, whistleblowers no longer have a fair chance. As currently mangled by that activist, hostile court, those who assert their anti-reprisal rights are virtually guaranteed a formal legal endorsement of the harassment they challenge. Without the chance for a fair day in court, posting employees rights could create a Pied Piper syndrome—creating more victims than are helped by leading employees into a trap that finishes off their careers.

We urge all the members of this committee to consider cosponsoring this session's version of legislation introduced last year by Representatives Morella and Gilman to restore the Whistleblower Protection Act's legitimacy. That legislation and the No Fear bill are both indispensable for federal workers to be public servants instead of bureaucrats. It is unrealistic to expect first class service from federal workers if they have second class rights.

PREPARED STATEMENT OF MATTHEW FOGG

Good morning ladies and gentlemen of the House Judiciary Committee. First, I give honor to my LORD and SAVOUR by stating, may the words of this statement and the meditations of my heart be accepted in THY sight. LORD, you are my strength and my redeemer, Amen.

On behalf of all the supporters gathered here today, I want to recognize and applaud the monumental efforts of Committee Chairman, F. James Sensenbrenner, Jr. for introducing the Notification and Federal Employee Anti-discrimination and Retaliation Act of 2001 (No FEAR) [H.R.169.HI] in the House of Representatives. Thank you for establishing procurement accountability in terms of judgment awards against agencies and their officials who are found guilty in Title VII claims and the Constitutional laws of this great nation. My testimony shall not only depict me, as victim of gross negligence in the federal workplace, but it will reflect my expert opinion as in the field of Equal Employment Opportunity (EEO) and Title VII procedures. I truly support your efforts to make this H.R. 169 hear after referred to as "No FEAR" a legislative reality for the unheard voices of thousands of dedicated employees of the United States Government.

In 1978, I joined the oldest federal law enforcement department in America known as the US Marshals Service (USMS). The USMS operates under the direct supervision of the US Department of Justice (DOJ). My distinguished career achievements will show that I served the USMS above and beyond the call-of-duty. My professional accolades include the USMS Directors Award and the US Attorneys Award for Meritorious Services to the citizens of the District of Columbia. Several of my success stories were featured in the *National Chiefs of Police* publication, *The DEA World Wide* magazine, on the national television show "Americas' Most Wanted" and I provided expert commentary to the Cable News Network (CNN) following the successful seizure of Elian Gonzalez.

In 1985, I initiated my first Equal Employment Opportunity (EEO) complaint against the USMS following blatant acts of race discrimination and reprisals from a high ranking management official. This same manager would retire seven years later, as a GS-15 Chief Deputy US Marshal, with an unblemished record. It was not until 1998, that a US District Court Jury would find him as one of many discriminating officials in my EEO case.

I'm truly sad to say that my career destruction did not end with that manager; I became the victim of many reprisals. I was forced to continuously file new claims with separate case numbers for each act of discrimination taken against me over a 13 year period. No one was held accountable until I entered the US district courtroom on April 4, 1998 (*Fogg* v. *Reno* 94–2824–TPJ).

It is even sadder to say that today, my sixteen year Title VII journey to justice is not over. My judgment alone involves five federal judges (including one who testified), three USMS directors, over fifty government witnesses ranging in grades from GS-9 to Senior Executive Service (SES), eight government attorneys, five plaintiff attorneys, a 25 day jury trial and a pending appeal.

Yes, this is the same federal agency that I honorably served and, on several occasions, literally placed my life on the line in the line-of-duty. I will never forget words spoken to me by one highly publicized federal prisoner who escaped while serving a life sentence for murder. I apprehended him before he could draw his loaded weapon. As he was being handcuffed, he told me, "Man, you must have had a lucky horseshoe in your back pocket." Ironically, his capture was an awful twist of fate;

it would be those who worked beside me within the rank-and-file of the U.S. Department of Justice that would "gun down" my career.

On the morning of April 28, 1998, a federal jury here, in our Nation's Capital, rendered a landmark verdict after deliberating over a mountain of evidence. They found the DOJ violated my Civil Rights in 14 of 15 separate interrogatories placed on the verdict form. The jury awarded me four million dollars, the rank of Chief Deputy US Marshal, and found the entire USMS to be a racially hostile work environment for all African American deputy US Marshals nationwide. This verdict is the largest jury award to a single federal employee in the history of Title VII.

Presiding judge, the honorable Thomas Penfield Jackson (known from the famed Microsoft trial), validated the jury findings in part, by stating in his written opinion on the verdict; *"the jury obviously inferred from the evidence of the endemic atmosphere of racial disharmony and mistrust within the USMS that all explanations were suspect, and that occult racism was more likely the reason than any other for Fogg's misadventures within the Marshals Service hierarchy."*

Judge Jackson also reduced the verdict to three hundred thousand dollars, indicating a 1991 amendment to the 1964 Civil Rights Act that other Judicial Circuits have interpreted, that Congressional intent was to allow federal employees to only recover up to $300.000 per case, instead of on, a per claim basis.

Surprisingly, Jackson also refused to expunge my USMS termination of record, even though the jury verdict specifically found it in violation of my Civil Rights. I have contested both issues; they are now pending a written decision from the US Circuit Court of Appeals in the District of Columbia, *NO#-00–5138* where oral arguments were concluded on March 19, 2001.

Today, I am utilizing my EEO and Title VII training, experience, expertise, and personal success as the Executive Director of a non-profit civilian organization known as the Redstone Area Minority Employees Association (RAM) in Huntsville, Alabama and a law enforcement group called, Congress Against Racism and Corruption in Law Enforcement (CARCLE) augment the continuous call for Civil Rights in Government.

Both organizations were created to assist federal, state, local and private-industry employees who have filed EEO complaints and are seeking advise on the EEO process and Title VII Litigation. Both RAM and CARCLE support the NAACP, Blacks in Government, national minority police organizations and other organizations with similar missions in the civilian and law enforcement communities across America.

In Huntsville, Alabama, I currently represent over fifty employees in various stages of the Administration process at the National Aeronautics and Space Administration (NASA)—Marshall Space Flight Center, the multiple US Army commands and other tenant agencies on the Redstone Arsenal. My representation in these matters encourages support of the provisions of No FEAR that are essential to government oversight and accountability. I had the opportunity to hear a GS-15 civilian management official for the US Army's Aviation and Missile Command testify under oath on three separate occasions that a black female engineer with a Ph.D. degree in Systems Engineering could not get promoted or transferred because she had been *"blacklisted"*. Initially, I was shocked at the boldness of his statement and the obvious lack of concern for any consequences from his superiors. He even described it as an actual list similar to what banks use to avoid certain areas of town. In talking to other employees and local AFGE union president in that area, it appears the term blacklisting is a common language and an accepted practice for reprisal in the Redstone Arsenal federal workplace. This is a clear example that federal management officials realize that they are not being held to the same accountability standards as are enforced on private industry.

It is without question that I believe the USMS, as supervised by the DOJ, would not have pushed *Fogg* v. *Reno* into a 16 year multi million misadventure with taxpayer dollars if the litigation expenditures and monetary awards were being extrapolated from the USMS budget plan. I think we all understand the popular American belief that states, "if you hit them in the pocket then you will get their attention".

Immediately following Judge Jackson's ruling and his decision for Equitable Relief in February 2000, he signed an order for the government to immediately pay my attorney $300,000 in legal fees, which they did.

Again, we observe an outrageous process where the DOJ simply challenges each dissatisfied outcome and extends an already long litigious process because, they know legally that monetary payments in Title VII will be extracted from a special US Treasury fund not accountable to the real violators of our great Constitution. No FEAR is fair because current laws permit our government to personally charge plaintiffs who do not prevail in Title VII claims with court cost and litigation fees. Therefore, in like manner No FEAR will levy real damages against discriminating

agencies and their officials who, do not prevail in Title VII claims and capture a record that will always expose a pattern of all illegal activity involving Title VII.

There are individuals who are concerned that if this HR 169 becomes law, particular agencies found in violation of Title VII and must pay monetary awards to cover the judgments, will in turn cut their hiring of minorities due to budget shortfalls. First, this would be another illegal act comparable to racial and sexual profiling and certainly would not deter discrimination if that is the actual intent of the agency heads. At the very least, what HR.169 will do is make agency heads accountable to their budgetary expenditures. Clearly, if the budget is reduced because of illegal activity under their watch, disciplinary actions up to and including removal shall be in order.

I understand that it was not the intent of Congress to allow the federal government to be bankrupted by large extraordinary damage awards. Therefore, a Cap on damages is apropos with respect to each specific claim (not Case) of Civil Rights violation. But, today private industry and public institutions are at a disadvantage because, they do not have the luxury of a giant and nebulous slush fund that is full of federal taxpayer dollars to always draw from whenever they decide to violate federal laws. Certainly they can understand why federal managers have no incentive to not repeat Civil Rights crimes.

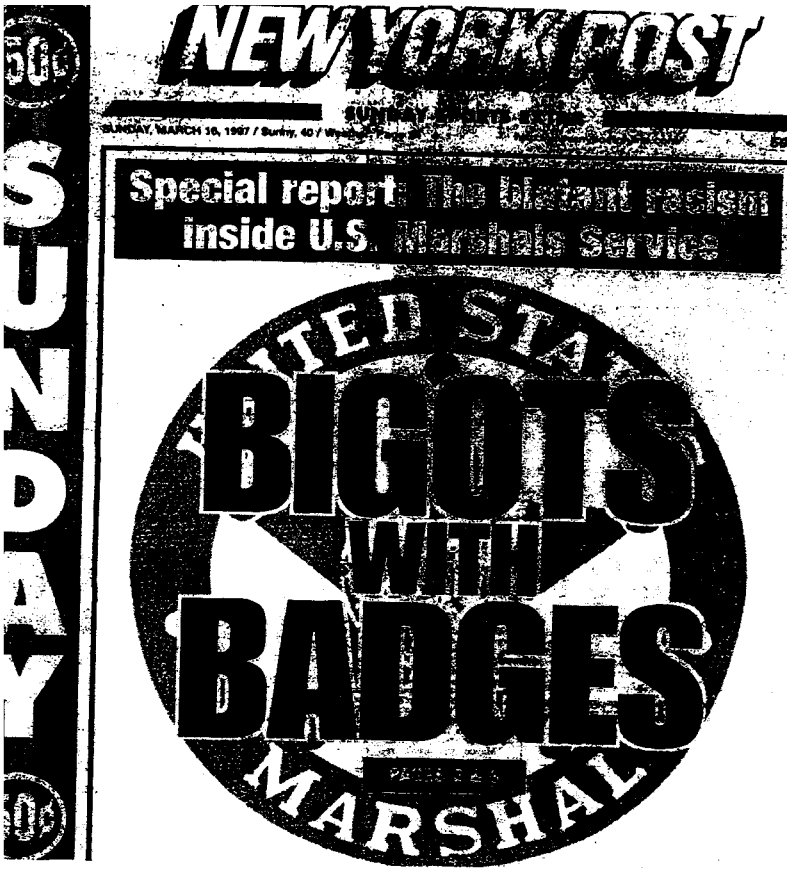
I must revert to a moment in my Title VII trial when the United States Marshal and presidential appointee, Herbert M. Rutherford III, stated on the witness stand that "if Fogg had been white, this would not have happened." Judge Jackson followed up with a question to Rutherford asking "Marshal Rutherford, are you telling me that because Matthew Fogg is African American that the USMS 'dug it's heels' in on his EEO claims?" Rutherford answered, "Absolutely!"

Finally, I must state one more incident in my trial that clearly verifies the USMS and the DOJ fostered an obvious attitude of no concern for accountability in a obvious no-win situation. On Friday, April 24, 1998 Judge Jackson persuaded both parties to attempt to reach a settlement, with a "Consent Decree", before presenting evidence to the jury. Jackson indicated that there was overwhelming direct evidence that a racial hostile environment did in fact exist in the USMS. All parties met and utilized a full trial day to create a comprehensive agreement that would foster an environment conducive to a non-discriminating atmosphere and eradicate disparate impact to all African Americans in the USMS.

Shockingly, on Monday, April 27, when trial resumed, the government told Judge Jackson, to his dismay, that USMS officials no-longer wanted to participate in a Consent Decree. Judge Jackson allowed the trial to go forward but, insinuated that overwhelming evidence was stacked against the government.

Ladies and gentlemen, this was the final act of defiance with very wasteful behavior by USMS and DOJ officials. It is direct evidence in support of the NO FEAR bill. Certainly, the USMS and DOJ top officials considered and knew that they would not be accountable to an obvious oncoming judgment that would involve a substantial monetary award and legal cost against them. Judge Jackson did everything legally possible to make that point known to the government. On March 19th 2001 the same USMS and DOJ were served a notice of "Class Complaint" involving some of the same African American witnesses in *Fogg* v. *Reno*. Again the overwhelming evidence is already on the record and road has been paved for a no-win situation for the government.

In closing, I submit that these existing attitudes by agency heads are simply fostered by non-accountable monetary Judgments. And this is the primary reason why Title VII claims such as *Fogg* v. *Reno*, Coleman V EPA, HUD, Agriculture, Commerce, NASA, USMS V DOJ, FBI V. DOJ, USSS V Treasury, DEA V. DOJ, FAA, US Army and many others are thriving and pending in the federal government today. I submit to you that HR 169 may be one small step in total government oversight but, it is one giant step for agency oversight and it's procurement accountability.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SUNDAY, MARCH 16, 1997 / Sunny, 40 / Windy, 28
Special report: The blatant racism inside U.S. Marshals Service
BIGOTS WITH BADGES
MARSHAL

Civil Judgment (Rev. 7/95)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MATTHEW F. FOGG
Plaintiff(s)

v.

Civil Action No. 94-2814

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES
Defendant

FILED

APR 28 1998

NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

JUDGMENT ON THE VERDICT
FOR PLAINTIFF

This cause having been tried by the Court and a Jury, before the Honorable THOMAS PENFIELD JACKSON, Judge presiding, and the issues having been duly tried and the Jury having duly rendered its verdict; now, therefore, pursuant to the verdict,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff MATTHEW FOGG have and recover of and from the defendant JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES the sum of FOUR MILLION DOLLARS ($4,000,000.00), together with costs.

NANCY MAYER-WHITTINGTON, Clerk

Dated: 4-28-98

By: Robin E. West
Robert E. West, Deputy Clerk

#10

4/28 2:21 recd ct.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MATTHEW F. FOGG,

Plaintiff,

v.

JANET RENO,

Defendant.

Civil Action No. 94-2814 (TPJ)

JURY INTERROGATORIES

1. Do you find that the plaintiff, Matthew Fogg, was subjected to and affected by a working environment that was racially hostile to African-American Deputy U.S. Marshals prior to November 21, 1991?

YES ✓ NO ___

2. Do you find that the plaintiff, Matthew Fogg, was subjected to and affected by a working environment that was racially hostile to African-American Deputy U.S. Marshals on and after November 21, 1991?

YES ✓ NO ___

3. Do you find that defendant U.S. Marshals Service discriminated against plaintiff Matthew Fogg, by disparate treatment and/or retaliation, in the following instances:

a. By his reprimand from Chief Hein in 1985 and his subsequent removal from the Welch/Columb Task Force and transfer to Superior Court?

YES ✓ NO ___

b. By the promotion of Deputy Slack rather than plaintiff to a GS-12 position in 1986?

YES___ NO ✓

c. By the failure to take timely action on plaintiff's 1985 EEO complaint?

YES ✓ NO___

d. By the failure to give plaintiff annual performance ratings for the two year period beginning in April 1990?

YES ✓ NO___

e. By the promotion of Deputy Earp rather than plaintiff in May 1990?

YES ✓ NO___

f. By the alleged failure to promote plaintiff to a GM-13 position while he was on the Metropolitan Area Task Force?

YES ✓ NO___

g. By the failure to promote plaintiff to a GM-14 position while he was on the Metropolitan Area Task Force?

YES ✓ NO___

h. By limiting plaintiff's supervisory duties on the Metropolitan Area Task Force in March 1992?

YES ✓ NO___

i. By inquiring about plaintiff's Equal Employment Opportunity activities during his working hours in 1993?

YES ✓ NO ___

j. By ordering plaintiff back to work in September 1994?

YES ✓ NO ___

k. By returning plaintiff to the GM-12 level in December 1994?

YES ✓ NO ___

l. By ordering plaintiff to report for a fitness-for-duty examination in 1995?

YES ✓ NO ___

m. By dismissing plaintiff from the U.S. Marshals Service on grounds of insubordination in September 1995?

YES ✓ NO ___

4. If the answer to number 2 and/or any of questions 3(f) through (m) above is YES, please indicate in the space below the amount of damages that plaintiff should be awarded for his pecuniary losses (property losses and credit damage) as well as for his emotional pain and suffering, inconvenience, embarrassment, humiliation, mental anguish and loss of enjoyment of life caused by the hostile racial environment and/or discrimination since November 21, 1991.

$ four million

5. Had defendant U.S. Marshals Service not maintained a working environment racially hostile to African-American Deputy U.S. Marshals, and had defendant not engaged in acts of discrimination against plaintiff Matthew Fogg, please indicate below the pay level that Matthew Fogg would have risen to in the U.S. Marshals Service by today:

Senior Executive Service ___

GS-15 (Chief Deputy) ✓

GS-14 (Supervisor) ___

GS-13 ___

GS-12 ___

PREPARED STATEMENT OF KRIS J. KOLESNIK

Mr. Chairman, members of the committee, thank you for the opportunity to submit my testimony for today's record in support of your bill, H.R. 169. Those who advocate strong rights for federal employees who demonstrate credibility when they blow the whistle salute your leadership in advancing this legislation.

Prior to becoming executive director of the National Whistleblower Center, I spent eighteen years working in the United States Senate for Senator Charles E. Grassley of Iowa. Senator Grassley has had a long history and developed a reputation as the Senate's champion and protector of whistleblowers.

Over the years, we literally saved the taxpayers hundreds of billions of dollars, and forced reforms of numerous agencies and departments following disclosures of gross mismanagement. Some examples of reforms include: the way the Pentagon purchases weapons; the way those weapons are tested; instituting integrity into the FBI crime lab. Each of these fixes followed big public scandals. I staffed that work for him. But none of this was possible without whistleblowers.

One thing is always certain: Despite the major contributions whistleblowers make on behalf of the public, management invariably retaliates. The choice managers face is, send the bad news up the chain of command and risk looking bad to the boss, or silence the messenger. Usually, the latter is the preferred option.

Congress has recognized the importance of protecting whistleblowers. And so you have passed laws to do so. Some of them work well, some don't. The best protections for whistleblowers are contained within the six environmental statutes identified in H.R. 169. These laws have effectively blocked EPA managers from destroying the careers of loyal scientists who have questioned EPA "science."

EPA has failed to implement the whistleblower provisions of the laws they are required to enforce. As a result, the National Whistleblower Center filed a formal request with the Administrator of EPA, seeking a review of their whistleblower practices. The review was assigned to the EPA Office of Inspector General (OIG). A report was issued by OIG that recommended that EPA employees be informed of their rights under the six statutes. Incredibly, EPA has overridden the advice of OIG, and continues to mislead its employees about their rights as whistleblowers.

It is for this reason that the National Whistleblower Center strongly supports H.R. 169. We believe that legislation is required if employees are to be fully informed of their rights.

The Center also supports the provision in the bill that requires reporting to Congress. There are very few statistics on discrimination and whistleblower cases. This data is important because, for Congress, it can be a warning system as to whether protections are working properly.

Just as important are the statistics revealing the number of those who are disciplined for discrimination, retaliation or harassment. This would be a good first step. Even more important is for Congress, through oversight, to determine who was *not* disciplined and demand that the agency hold those parties accountable.

Accountability is the one true deterrent against discrimination and retaliation. Without it, managers feel it is open season on employees. Whistleblowers often need to bring not just one case, but two or three. One such case is that of Dr. William Marcus, the renowned EPA toxicologist and a Senior Science Advisor.

The Department of Labor found that EPA had, through a pattern of isolating and repressive activity by many supervisory personnel, retaliated against Dr. Marcus for engaging in protected whistleblowing activity. In fact, EPA fired Dr. Marcus and stripped him of his federal pension because of his whistleblowing activities. It was only after a costly two-year legal battle that Dr. Marcus was fully vindicated, ordered reinstated and awarded compensatory damages. None of the wrongdoers in the Marcus case was ever held accountable.

The failure of EPA to take any action to discipline the wrongdoers only made the problem worse. After reinstatement, Dr. Marcus was subject to an illegal campaign of isolation and bad- mouthing. After yet another two-year legal battle, Dr. Marcus again won before the Labor Department, and again obtained a large compensatory damage award. But EPA's pattern of misconduct continued. None of the three managers responsible for the second round of retaliation against Dr. Marcus was ever held accountable.

Let there be no mistake, accountability is the key to successful long-term protection of whistleblowers because, without it, there is no incentive for retaliation to stop.

In conclusion, Mr. Chairman, it is my hope that this committee will recognize the importance of H.R. 169, and the need to strengthen protections and rights for whistleblowers. The Center stands ready to lend its support in any way possible. I would only add that, should the legislation pass, oversight by Congress is still needed to

hold officials accountable for their wrongdoing. That is how any law is best rendered effective.

Thank you again, Mr. Chairman, for the opportunity to submit this statement for the record.

PREPARED STATEMENT OF DAVID L. LEWIS

Dear Mr. Sensenbrenner:

I would like to express my personal support for the NOFEAR ACT and provide your Committee with examples from my own personal experiences at to why this ACT is beneficial to all Americans.

I have worked as a microbiologist for the US Environmental Protection Agency in Athens, Georgia for over thirty years. In one of my recent research projects, I, and other scientists working with me, discovered that microorganisms are affected by environmental changes in such a way as to dramatically affect the impact of pesticides and other environmental pollutants. Our report of the discovery was published in the British science journal Nature in October, 1999.

Because the research uncovered potentially serious flaws in some of EPA's regulations, managers at EPA headquarters in Washington, D.C. were not happy. Simply stated, the results of objective scientific research did not square with their political agenda. EPA Assistant Administrator Norine Noonan, who headed the Office of Research & Development during the previous administration, fired off a number of e-mails saying that she was so mad at my director, Dr. Rosemarie Russo, for approving the article that she could "spit nails." She ordered that Dr. Russo be removed from her position in Athens, a directorship that she had held for over 16 years, and that she be transferred to Washington, DC. According to Norine Noonan's sworn testimony, the only person she consulted with prior to taking this action was Deputy Assistant Administrator for Management Henry Longest, who supported the decision.

After investigating for nearly three months, the Department of Labor (DOL) held that the Noonan/Longest decision to remove Dr. Russo was illegal and had violated employee protection provisions of federal environmental statutes. Afterwards, it was revealed during House Science Committee hearings that the Noonan/Longest decision to remove Dr. Russo had also not followed proper government personnel procedures.

DOL also found that another manager directly reporting to Noonan, Dr. Gary Foley, had also retaliated against Dr. Russo when he refused to nominate her for a special act award. Dr. Foley is the Director of the National Exposure Research Laboratory. He took this adverse action even though he admitted that Dr. Russo had earned the award for outstanding performance.

After the DOL issued its findings against EPA, I understand that the adverse actions against Dr. Russo were subsequently reversed, thereby vindicating findings by the Science Committee and the Department of Labor. Mr. Longest, however, the decision-maker involved in retaliating against Dr. Russo, was elevated to Acting Assistant Administrator. He currently maintains this high-level position over EPA scientists in the Office of Research & Development. Moreover, the other manager involved in the retaliation has also remained in his high-level position.

Actions taken against Dr. Russo by top EPA managers first began in 1996 when Nature published a commentary of mine questioning the impact of politics on science at EPA. Retaliations against me by Mr. Longest and Dr. Foley came fast and furious. It was alleged (falsely, I may add) that my writings were unethical and that my positive references to the opinions of Republican Congressmen constituted a criminal violation of the Hatch Act. Dr. Russo testified under oath that she was asked by Dr. Foley whether or not I have a "death wish." Other Athens managers testified that they were told to "put a muzzle" on me.

The Labor Department investigated and found that EPA managers had wrongly accused me of ethics and Hatch Act violations. EPA wrote a letter of apology, clearing me of the unwarranted charges; but, the pace of retaliation only intensified.

The Labor Department investigated yet again and found that EPA officials had denied me a promotion in a retaliatory and discriminatory manner. To settle the case, EPA offered me a four-year detail to the University of Georgia under the Intergovernmental Personnel Act (IPA) and insisted that I resign my job at EPA by no later than May 28, 2003. It was clear that Mr. Longest and Dr. Foley were not going to allow me to continue doing scientific research that may not be supportive of EPA policies. I thought that, under the settlement, I could at least get in a few years of unhindered research at the university and be able to find other opportunities to

pursue a career in science and support my wife and two children. How naive I was to think that my ordeal was over.

When I began my IPA, Mr. Longest removed Dr. Russo's status as my Deputy Ethics Official. All personnel actions regarding me had to be approved by Mr. Longest and Dr. Foley. They then used this authority to prevent me from accessing public databases needed in my research and to deny me permission to collaborate with other EPA scientists. The IPA, as it turned out, was a just a means for removing me from my EPA research project and placing me where I could not conduct environmental research any longer. With a track record of no productivity in my field for four years, it would be unlikely that I could find employment as an environmental scientist upon leaving the EPA.

At the Athens laboratory, EPA scientists continue to feel intimidated by EPA' s practice of retaining and promoting managers who retaliate and discriminate. Over recent months, a number of scientists have confided in me about very serious ongoing problems with those who remain in direct control above the Athens laboratory. I am truly shocked at some of the things I am hearing, and have urged them to report the problems. Because of fear, however, they are afraid to file any formal complaints or talk about the problems publicly.

The naming of the NOFEAR ACT, therefore, is so appropriate. If asked what the most damaging consequence to come out of my situation is, I would have to say it is fear. I speak of fear among scientists and front-line managers that developed after witnessing that even scientists of good reputation supported by the Labor Department and some of the best lawyers in country cannot keep their jobs when targeted by managers who retaliate and discriminate.

I call the Committee's attention to these matters to point out that a legislative response is clearly needed. Something must be done to stop federal agencies from retaining and promoting managers who retaliate and discriminate against employees. Without the NOFEAR ACT, we will be left to depend on top Administration officials to inform employees of their rights under employee protection provisions of federal environmental statutes. Yet, the EPA refuses to inform its employees of these rights. Without the NOFEAR ACT, we will be left to depend on top Administration officials to rid their organizations of those who violate employee rights. Yet, there exists no system for reporting violations to the Administrator and no requirement that any action be taken.

In conclusion, I would like to thank you and all of the Members of the Committee for giving me an opportunity to express my feelings about the NOFEAR ACT and the important role it stands to play in protecting employees. With regard to the EPA, I am sure that taxpayers want an Agency that hires scientists to protect public health and the environment, not one that hires them to protect government policies and policymakers.

PREPARED STATEMENT OF GERALD R. REED AND RAWLE O. KING

Chairman James Sensenbrenner, and distinguished members of the Committee, thank you for holding today's most important hearing on H.R. 169, "The Notification and Federal Employee Anti-Discrimination and Retaliation Act (the NO FEAR ACT) of 2001." We thank the chairman for his leadership in this vital area of public concern. Blacks In Government (BIG) strongly supports the passage of H.R. 169.

BIG was organized in 1975 and incorporated as a non-profit organization in the District of Columbia in 1976. We are a professional development association comprised of Federal, State, and local public servants in eleven regions nationwide. BIG is committed to promoting equity, excellence, opportunity, and a workplace free of discrimination and retaliation.

SYSTEMIC DISCRIMINATION IN GOVERNMENT AGENCIES

The significant monetary losses suffered by the Federal Government in recent class-action lawsuits point to systemic and systematic patterns of race and sex discrimination in many Government agencies. It has become clear that these agencies have retaliated against complainants for standing up for their rights. Under current law, agencies are held harmless when they lose judgements, awards, or compromise settlements in whistleblower and discrimination cases. The NO FEAR ACT would help hold agencies responsible to protect Federal employees from discrimination and retaliation when they exercise the rights available to them under Federal laws. H.R. 169 would ensure accountability throughout the entire Federal Government—not just the Environmental Protection Agency (EPA).

Discrimination Costs American Taxpayers Billions

The constitutional framework of the United States Government asserts a commitment to equal justice for all, and to remedying injustice when it is found. Within this framework, the laws governing Federal employees have stipulated certain rights and privileges. However, far too many Federal executives, managers, and supervisors violate those laws, and are able to use the cover of their authority to evade responsibility and accountability. We estimate the cost to American taxpayers to be billions of dollars, but almost no responsible parties have been disciplined for what amounts to massive mismanagement of public funds.

What results is harm to employees subjected to maltreatment, harm to the morale and productivity of the rest of the workforce, and harm to the public, which pays the costs and loses the benefits of effectively administered programs. The privileges and freedoms of American citizenship are damaged and eroded.

In the case of Cook v. Billington, the Library of Congress racial discrimination class action lawsuit, first filed in 1982 and decided in 1993, the Government paid the aggrieved parties $8.5 million, and their lawyers more than $1.5 million, for a total of about $10 million. In the case of Hartman v. Albright, the Voice of America/U.S. Information Agency class action sex discrimination lawsuit, the Federal Government is now committed to pay 1,100 aggrieved women some $508 million, plus at least another $12 million in legal fees for a total of at least $520 million. In the case involving the black farmers versus the Department of Agriculture the Government is committed to paying out billions for the injustices of unscrupulous managers.

If someone stole over a billion dollars from the Government, they would be imprisoned for a very long time. In the above cases, no managers have been disciplined to the extent that it would send a message of the Government's commitment to a non-discriminatory work environment. It is fiscally irresponsible and patently unfair to support outright thieves who steal public money. If we are going to let the Title VII offenders go free and pay their legal costs, we should let others who raid the Federal coffers go free and pay their legal costs, as well. Or, they should all be held accountable. Title VII violations that result in losses of Federal money of any amount should be treated just like other criminal acts, and the offenders should have to pay substantial fines and/or go to jail. If this systemic injustice is permitted to continue, there will be a continuing stream of litigation adverse to the Federal Government, costing the taxpayers ever more massive amounts of money.

Equally important, the extent and intensity of racial discrimination/profiling in Federal employment is obscured by the nature of the complaint procedures and by the cost of litigation, which is a major deterrent to would-be complainants.

SUMMARY OF H.R. 169

H.R. 169 would:

- require that each Federal agency to send an annual report to Congress and to the Attorney General listing the number of employees disciplined for discrimination, retaliation, or harassment, and the number, severity and disposition (i.e., monetary settlement amounts) of discrimination and whistleblower cases involving the agency;
- require agencies to pay for any judgements, awards, or compromise settlements in whistleblower and discrimination cases out of their own budgets, rather than the Government-wide fund;
- require Federal agencies to notify employees about any applicable discrimination and whistleblower protection laws; and
- require the President to establish a list of all statutes covered by the NO FEAR ACT that prohibit discrimination.

ANALYSIS

H.R. 169 is basically sound. The essence of the bill is to require agencies to pay the costs of their own unlawful acts in violation of employee rights, to report annually to Congress and the Attorney General on the incidence of cases and discipline of perpetrators, and to notify employees about applicable laws. The President is required to establish a list of all statutes covered by this Act. The power of the act rests upon the public exposure of wrongdoing and the necessity of reporting it to Congress. But it could be strengthened by filling three lacunae:

1. It would allow guilty parties to penalize innocent parties by passing on the costs of discrimination in the form of reductions in employment, employee compensation, or program benefits intended for the public.

2. It would leave to the discretion of the President which laws are or are not included under its coverage.
3. It would maintain a separate status for civil rights laws as if they were inferior to other Federal laws.

RECOMMENDATIONS

BIG fully supports the purposes and intent of this bill. However, we would recommend changes which would ensure that the purposes and intent are properly carried out. We urge the Committee to add the following provisions:

1. A prohibition on using expenditures required by settlement of any employee rights claim to reduce employment, benefits, or compensation of any employee not found culpable for the violation of rights.
2. A stipulation in the law itself that all laws governing Federal employee rights shall be identified and listed by the President as covered by the Act.
3. A specific requirement that all Federal employees are expected to report violations of listed laws as they would violations of any other Federal law, and to testify or provide evidence fully, fairly, and honestly as to their knowledge of violations.
4. Federal agencies are required to submit data by fiscal year on discrimination and whistleblower cases. Many of these agencies are just beginning to submit the required data in a credible format. Federal agencies are funded on a fiscal year basis. In the interest of consistency and the minimization of administrative costs, we recommend that the reporting requirement should be to submit quarterly data, as compared to the annual calender year data now stipulated in the bill.

CONCLUSIONS

In conclusion, it is very clear that discrimination and retaliation in Federal agencies too often go unchecked. If these injustices are allowed to continue, the economic base of the many African Americans and other minorities who work for the public sector will be further eroded. This condition has become untenable and we all must take a stand so that justice once again can prevail.

While Government scientists must be allowed independence and protection, it is even more critical for employees in job series performing oversight functions to be protected and allowed independence. We are referring specifically to the contracting, engineering, accounting, and auditing series employees who are responsible for day-to-day fiscal responsibility and compliance within Federal agencies. The agencies with specific relevant data comparable to EPA include the Department of Energy, Library of Congress, Department of Defense, and others as specified in the NAACP Task Force Report.

PREPARED STATEMENT OF STEVEN M. SPIEGEL

Dear Chairman Sensenbrenner and members of the Judiciary Committee,

Until recently, I was an attorney in EPA's Office of Enforcement. I am submitting this statement for the record for the May 9, 2001 hearing on discrimination and retaliation at the Environmental Protection Agency and the continuing need for the NO FEAR legislation to hold such agencies accountable.

I was one of the EPA employees who, along with Dr. Coleman-Adebayo, met with the House Science Committee in October 1999 about discrimination and retaliation at EPA. We were then subjected to retaliation by EPA for meeting with your committee staff.

I reported to your Committee that I have observed EPA engage in all manner of discrimination, and that EPA often further retaliates against its employees using any excuse as a pretense. I have been subjected to disability and religious discrimination and retaliated against for pursuing legal redress. This retaliation continued until EPA fired me under the pretense of poor performance for the time they knew I was very ill and required surgery. After meeting with the Committee, EPA retaliated with AWOL charges for sick leave that had already been taken over the prior two months. EPA only withdrew the AWOL after I submitted additional medical documentation and Chairman Sensenbrenner wrote to Administrator Browner. However, shortly thereafter, EPA placed me on performance probation after having confirmed my illness and the need for surgery. Rather than accommodate my ill health, EPA sought to deliberately exploit my medical condition to fire me. Even though EPA had specifically inquired if I had medical condition affecting my ability

to perform, they disregarded the documentation of my serious illness without any explanation or discussion. When I informed them of the date of my surgery, they prematurely ended the performance probation and fired me after a twenty year career on that basis. When my several doctors supplied medical documentation for my termination proceedings, EPA again ignored them. EPA has consistently disregarded its responsibilities as a government agency and disregarded the facts throughout my ordeal in order to continue engaging in discrimination and retaliation.

Despite the scrutiny of the Congressional Committees, EPA has continued to routinely disregard its civil rights responsibilities under the Civil Rights laws and regulations administered by the EPA and the Equal Employment Opportunity Commission. There are three important ways the EPA abuses its authority and responsibilities in the EEO legal process to prejudice the rights of employees who have been subjected to discrimination and retaliation.

First, EPA has continued to routinely fail to even investigate EEO complaints as required by law. This deliberate inaction renders the legal process meaningless and thwarts the rights of the employees it has discriminated against by preventing the legal process from going forward as Congress and the EEOC intended.. The employee cannot pursue their rights while EPA wastes six months time doing nothing when the law requires an investigation to document facts and move the case to conclusion.

Second, EPA then compounds this misconduct by dismissing complaints without any stated reasons at the end of the six month investigation period, further perverting the legal process and punishing its employees. This then places the employee at a disadvantage of either having to choose the expense and delay of appealing the improper dismissal to the EEOC in order to purse the administrative process, or the great expense of having to go to court. These two forced options are the opposite of what Congress and the EEOC intended for this legal process.

Third, when EPA does conduct an investigation, it routinely perverts the Civil Rights legal process by improperly narrowing the scope of the investigation in order to not find any violations. The EEO process requires agencies to investigate the claims presented by the complainant. EPA routinely attempts to illegally dismiss those claims by unnecessarily rewriting those claims into a narrow statement of issues so the real claims presented by the employee are simply disregarded. This action perverts the Civil Rights process because the claims are effectively dismissed without due process of law and the right of appeal, while preventing the claims from being properly investigated and resolved. This improper course of conduct by EPA is contrary to the EEOC regulations and directives, and takes place even where the EEOC has ordered the EPA to investigate.

EPA has forced me to file three formal complaints. All of these complaints could have been resolved during the informal resolution periods, but EPA did not attempt to resolve the complaints. The complaints are supposed to be accepted or dismissed within thirty days. Then an investigation is supposed to be completed within six months of the filing of the formal complaint. In all three cases EPA failed to initiate investigation. In the two cases for which the six months elapsed, EPA then dismissed the cases without any stated reasons. Both of those cases were appealed to the EEOC. In both cases, about a year later, the EEOC found the complaints stated claims and ordered the EPA to investigate within thirty days. In both cases the EPA failed to begin to take any actions for about six months. In one case, after the EEOC ordered the reinstated case investigated, the EPA attempted to improperly narrow the investigation to exclude the claims ordered to be investigated by the Commission. When EPA was requested to correct the scope of the investigation, they simply suspended the investigation altogether, without even providing written notice.

Throughout this period that Congressional Committees have been looking into the situation at EPA, its Administrators have protested the accusations of irresponsibility while pledging to correct the situation. Despite these public statements, the agency has continued to engage in the same misconduct. My attorney has even written letters to Administrators Browner and Whitman requesting that the agency look into resolving my case as they publicly pledged, yet both letters have simply gone unanswered.

EPA has engaged in widespread discrimination and retaliation against its employees. EPA has then compounded its transgressions by deliberating perverting the EEO Civil Rights process into another weapon its uses to punish its employees. EPA has continued in this misconduct without any effective oversight and without any consequences for its actions. There is a stark difference between the EPA's public statements and its actions regarding carrying out its responsibilities under the Civil Rights laws. The oversight and protections of the NO FEAR bill continue to be sorely needed.

Respectfully submitted,
Steven M. Spiegel

MATERIAL SUBMITTED FOR THE HEARING RECORD

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
80 F Street, N.W., Washington, DC 20001 • (202) 737-8700
FAX (202) 639-6490 • http://www.afge.org

Bobby L. Harnage
National President
Jim Davis
National Secretary-Treasurer
Andrea E. Brooks
Director, Women's/
Fair Practices Department

May 31, 2001

The Honorable F. James Sensenbrenner, Jr.
Chairman, Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515-6216

Dear Mr. Sensenbrenner:

Thank you for the opportunity you provided to me to testify before the Committee on the Judiciary on May 9, 2001 regarding H.R. 169, the "Notification and Federal Employee Antidiscrimination and Retaliation Act of 2001." Also, thank you for providing me the opportunity to respond to the post-hearing questions. My responses are enclosed.

I look forward to working with you on this important legislation.

Sincerely,

Bobby L. Harnage, Sr.
National President

1. **As the President of a National Union affiliated with the AFL-CIO, to the best of your knowledge do not-for-profit companies ever have problems with discrimination?**

(A) Since non-profits and governmental agencies, like for-profit companies, hire both workers and supervisors from the same American labor pool, there is a similarity in experiences of civil rights violations experienced by these employers. However, no non-profit organization (like AFGE), and very few for-profit company employers, can afford to engage in certain personnel and litigation tactics that we see routinely adopted by federal agency employers and their lawyers. I am speaking of the documented problems of denial and delay.

When the Equal Employment Opportunities Commission (EEOC) permitted agency heads to reject findings of discrimination issued by EEOC Administrative Judges after full-blown hearings (from 1972 until 1999), this discretion led to widespread abuse. As you know, many large agencies rejected 100% of the post-hearing findings for several consecutive years. The agency practice of denying any wrongdoing by its supervisors even after impartial trials by EEOC Judges reflected the agency attitude that infected the entire process. If the agency wasn't denying wrongdoing under any and all circumstances, the agency personnel and the agency attorneys were prolonging the process. There are numerous examples of federal government discrimination cases lasting into the second decade, and beyond. No non-profit organization can operate in that manner. Resolution replaces denial as a priority. Yes, non-profits have discrimination problems. They just handle it differently and they could not afford to handle it like federal agencies routinely do.

2. **From your unions experience, what are the costs to Federal employees who have to confront discrimination and what are the costs of to those employees to bring forward a complaint? Please describe the costs in terms of financial, professional and personal costs.**

(A) There are significantly higher costs in litigating against the federal government as compared to litigating against any other party. Federal agency defense counsel have no monetary guidelines affecting their litigation strategy. Justice Department counsel have priorities that do not exist for non-governmental parties and their counsel. Sometimes, agency counsel defend a principle that overstates the value of the lawsuit itself. Other governmental agenda also play significant factors. The prime example of this proposition is the $57 million expense of Special Counsel Ken Starr in the Whitewater investigation. No non-governmental party (including the opposing parties to a federal lawsuit) could ever contemplate such expenditures or match such investments of funds and resources. There is simply no market rationale when a federal employee brings a discrimination lawsuit against the federal government. As a result, federal

employees who confront discrimination pay an enormous price financially. Also, since federal agency discrimination cases linger for decades beyond their private sector counterparts, the federal complainant pays an enormous price professionally as well, as employers and co-workers rarely ignore a pending civil rights allegation.

3. **In October 1999, the Chapter of the National Treasury Employee's Union that represents EPA employees sent a letter to me, as Chair of the Science Committee, regarding retaliation against whistleblowers. I would like to submit this letter for the record. In that letter, the NTEU states "that even when employees who have been subjected to retaliation fight back and win - in court or at the Department of Labor - the management officials responsible for such reprehensible and repressive action have never in [their] memory been disciplined or suffered any adverse consequence." Mr. Harnage, as the National President of the American Federation of Government Employees, would you agree and say that this is a problem with Federal agencies?**

(A) I agree. I am unaware of a personnel sanction taken against a management official found responsible for intentional unlawful discrimination. We must have some accountability for such offenders who act under the authority of the federal government, whether they are federal managers or federal contractors.

4. **In 1999, GAO reported that there "has been an increase in the number of complaints alleging reprisal, which, for the most part, involve claims of retaliation by employees who have previously participated in the complaint process." Mr. Harnage, has your union seen an increase in retaliation complaints as well?**

(A) Yes, reprisal complaints have increased, and so has the number of findings of reprisal. Whenever there is a finding of reprisal, a particular supervisor or supervisors are at fault, and no current system exists to even identify their names. Accountability in this regard would have a greater impact than merely requiring the agency to pay the assessed damages – a penalty that could easily be met by eliminating a couple of co-workers' jobs or employee benefits, thereby increasing the number of victims. Discriminatory acts should result in loss of contracts for offending contractors and disciplinary actions for offending supervisors.

5. **Why do you think the Federal agencies are complacent when dealing with discrimination? Do you believe that H.R. 169 works to change that complacency?**

(A) I believe that federal agencies are complacent when dealing with discrimination because there are few disincentives or penalties meted out to managers who discriminate illegally. H.R. 169 moves in the right direction with its reporting requirements, but I do not feel agency complacency is remedied by the current provisions of the bill for the reasons mentioned in response number 4 above. The reporting requirements should be amended to include detailed information regarding the account(s) utilized for reimbursements to the Judgment Fund.

6. **H.R. 169 is the result of an oversight investigation of the Environmental Protection Agency regarding discrimination and retaliation. Is the problem with that agency or is this a government-wide problem?**

(A) I do not believe that the particular agency at issue is unusual in any regard. I believe the discrimination and retaliation problems are government-wide.

7. **As the President of a national Federal employees' union why do you believe the reporting requirements of H.R. 169 are important?**

(A) I believe that the reporting requirements of H.R. 169 are important, but as presently drafted, not strong enough. At the very least, federal contractors should not receive a free ride for their discriminatory acts. They should report as well. Further, annual reports should reflect why no disciplinary actions were initiated for every case that includes a finding of intentional discrimination. Also, as mentioned in response number 5, information regarding the account(s) utilized for reimbursements to the Judgment Fund should be included in the reporting requirements of H.R.169.

8. **Last year, House Civil Service and Agency Organization Subcommitte Chairman Joe Scarborough introduced H.R. 4362, the Equal Employment Opportunity Data Disclosure Act. This act would have required agencies and the Equal Opportunity Employment Commission to post statistical data relating to discrimination complaints on its public Web site. The idea behind this bill, like NoFEAR, was to bring more accountability to agencies and EEOC by having them disclose complaint-related data. Do you have any comments on this matter?**

(A) I prefer not to comment on that bill at this time.

GAO
Accountability * Integrity * Reliability
United States General Accounting Office
Washington, DC 20548

June 26, 2001

The Honorable F. James Sensenbrenner, Jr.
Chairman, Committee on the Judiciary
House of Representatives

Subject: The Federal Workforce: Answers to Questions Related to the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2001

Dear Mr. Chairman:

This letter responds to your request for additional information following the Committee's May 9, 2001, hearing on the Notification and Federal Employee Antidiscrimination and Retaliation (NoFEAR) Act of 2001, at which I testified.[1] Because our responses to your questions are based primarily on our previous work and the knowledge we have gained in doing this work, we did not seek agency comments on a draft of this letter. Your questions and our responses follow.

1. Please describe what kind of message an agency sends to its employees when its managers and employees who discriminate are not disciplined.

Under regulations promulgated by the Equal Employment Opportunity Commission (EEOC) governing the discrimination complaint process for federal employees, agencies are to take appropriate disciplinary action against employees who engage in discriminatory practices.[2] Not taking action—or the appearance that action is not taken—can send a message that the agency is indifferent to unlawful discrimination or, worse, tolerant of such behavior. We believe that transparency is important with regard to reporting actions taken in cases in which discrimination is found, lest the agency send an unintended message that it is not committed to treating its workforce fairly and holding individuals accountable for their actions. Therefore, in addition to an unambiguous policy of zero tolerance, an agency should have clearly defined and transparent policies and procedures for identifying and determining the culpability of individuals involved in discrimination cases. In other words, employees should be

[1] *The Federal Workforce: Observations on Protections From Discrimination and Reprisal for Whistleblowing* (GAO-01-715T, May 9, 2001).

[2] 29 C.F.R. 1614.102(a)(6).

fully aware of what conduct is not allowed, the consequences for misconduct, and how a determination of misconduct will be made.

2. Under the current system, federal agencies must pay out of their own budgets if they settle in the administrative process. If the agencies fight the case through the courts, however, the agencies do not have to pay for any settlement or court decision. Instead, as you know, the money comes out of the general fund.

a. Under this current system, would you agree that there is a financial incentive to prolong the case regardless of the merits of the government's position?
b. Do you believe that the current system is beneficial or detrimental to federal employees?
c. Do you believe that the current system discourages federal employees from coming forward with concerns?

As I described in my testimony, federal agencies bear the cost of judgments and settlements when a case is resolved by administrative procedures, such as the procedures for discrimination complaints under the jurisdiction of EEOC. However, when a lawsuit is filed, any subsequent relief (except in the case of the Postal Service) is generally paid by the Judgment Fund. The Judgment Fund, created to avoid the need for a specific congressional appropriation for settlement and judgment costs, provides a permanent indefinite appropriation for paying settlements and judgments against the federal government. In this way, the Judgment Fund provides a safety net to help ensure that agency operations are not disrupted in the event of a large financial settlement or judgment and that monetary awards are paid in a timely fashion. The availability of the Judgment Fund as a source for paying settlement and judgment costs also gives agencies the opportunity to shift financial accountability for paying these costs from their own budgets to the Judgment Fund. However, we have no information regarding the extent to which agencies intentionally have or have not avoided resolving discrimination complaints through administrative procedures to shift the burden of payment to the Judgment Fund. Similarly, we have no information regarding the extent to which the current system is beneficial or detrimental to federal employees or the extent to which it discourages them from coming forward with their concerns.

3. At the hearing, you testified that the Postal Service was not negatively impacted by the fact that the Postal Service is required by law to pay discrimination judgments and cannot dip into the general treasury's Judgment Fund.

a. How has the Postal Service responded to the responsibility of paying for such judgments?
b. Has the number of Postal Service discrimination complaints increased?

Prior to the Postal Reorganization Act of 1970, the Post Office Department (as the Postal Service was then called) had a permanent appropriation of postal revenues to pay judgments. With the passage of the Reorganization Act, the law changed to provide that judgments against the Postal Service be paid out of any funds available to the Service. Unlike other federal agencies, the Postal Service does not have the safety net that the Judgment Fund provides for paying the costs of settlements and judgments. This appears consistent with a goal of the Reorganization Act to bring private-sector business practices to the Service. Although we have not formally studied this issue, we are not aware of any situation in which Postal Service operations were disrupted as a result of paying the cost of a settlement of judgment.

Like other federal agencies, the Postal Service faced an increase in the number of discrimination complaints filed by its workers under the complaint process within EEOC's jurisdiction.[3] After rising during most of the last decade, however, the number of postal workers' discrimination complaints has declined recently, as table 1 shows.

Table 1: Discrimination Complaints Filed by Postal Workers, Fiscal Years 1991-2000

1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
7,772	8,469	8,858	10,221	13,322	13,252	14,326	14,397	12,027	10,553

Source: EEOC.

The decline in the number of discrimination complaints in fiscal years 1999 and 2000 coincides with the Postal Service's agencywide deployment of its alternative dispute resolution (ADR) program in fiscal year 1999. The program called REDRESS (Resolve Employment Disputes, Reach Equitable Solutions Swiftly), which uses mediation as the exclusive ADR technique, began with pilot sites in 1994 and expanded to other sites because of the high number of discrimination complaints and the sense that many complaints are rooted in personality conflicts.

We are sending copies of this letter to the Ranking Minority Member, Committee on the Judiciary; the Chairman, Subcommittee on Civil Service and Agency Organization, House Committee on Government Reform; the Ranking Minority Member, Subcommittee on Civil Service and Agency Organization; the Chairman, Subcommittee on Proliferation, International Security, and Federal Services, Senate Committee on Government Affairs; and the Ranking Minority Member, Subcommittee on Proliferation, International Security, and Federal Services.

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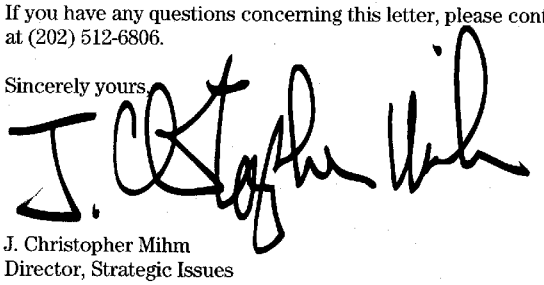
[3] *Equal Employment Opportunity: Complaint Caseloads Rising, With Effects of New Regulations Unclear* (GGD/GAO-99-128, Aug. 16, 1999).

If you have any questions concerning this letter, please contact me or Anthony Lofaro at (202) 512-6806.

Sincerely yours,



J. Christopher Mihm
Director, Strategic Issues

U.S. DEPARTMENT OF AGRICULTURE
RACIAL EPITHETS

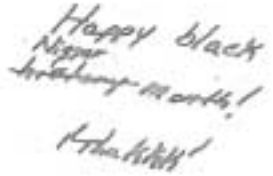
N.A.A.C.P. – "Now Apes Are Called People"

The above "definition" of the NAACP was posted on a wall at the U.S. Department of Agriculture, headquarters in Washington, D.C. An identical (copy cat) version of this "definition" was sent to the USDA, Coalition of Minority Employees (COME) President's church in Alabama after he announced Black History month events at USDA.

OTHER RACIAL SLURS AND EPITHETS: According to the "National Treasury Employees Union (NTEU) Local Chapter 226 (November 1998 newsletter), it was alleged that some Senior Agriculture Officials, in conversation, used extremely derogatory terms such as "JUNGLE BUNNIES" and "WONDER MONKEYS" when referring to higher ranking African-American employees.

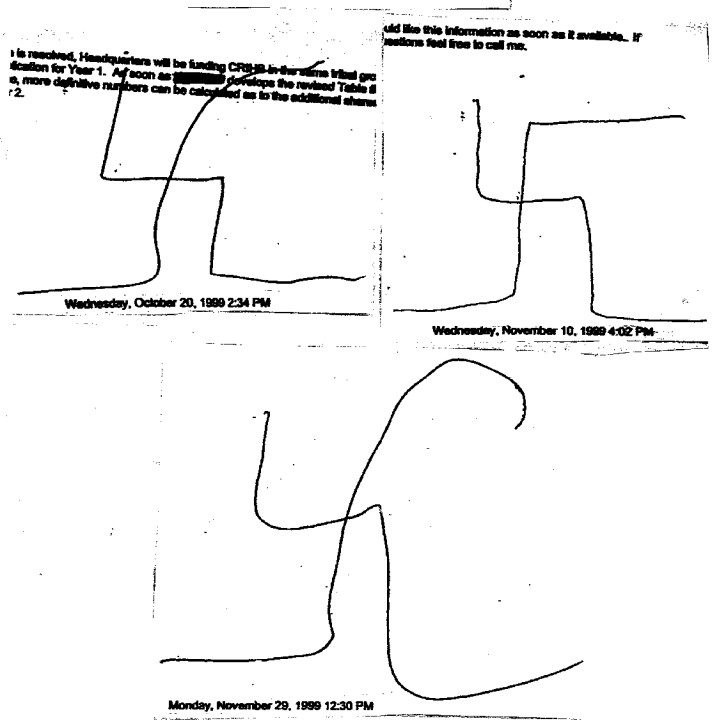
It should be noted that some of the accused managers occupy very high positions and are in position to influence agency hiring, affirmative action, and EEO policies. NAACP was unable to find any information delineating punishment of the guilty parties.

The following are additional examples of racial slurs appearing on various documents or walls at USDA:



INDIAN HEALTH SERVICE
Rockville, MD

Employee's Nameplate

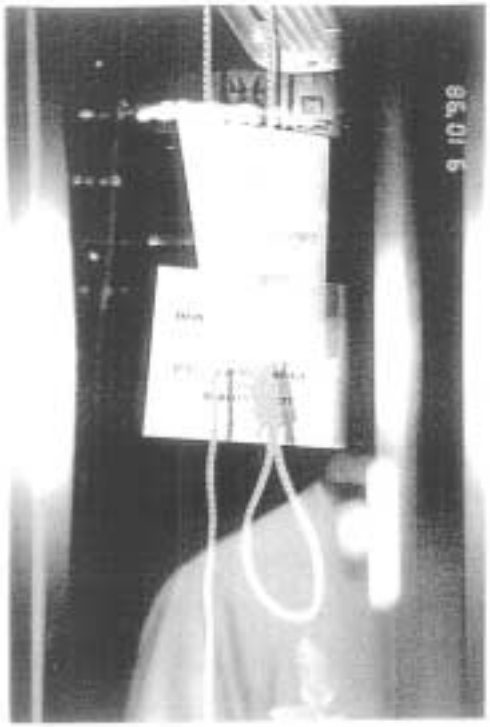


Hate Crime Symbols in Workplace

The above Anti-Semitic symbols were placed on a Jewish employee's nameplate and three (3) separate e-mail messages that were lying on the employee's desk at the Indian Health Service site in Rockville, MD (10/20/99, 11/10/99, and 11/29/99). Each incident was investigated by the local police and recorded as a hate crime.

The employee has expressed fear for his own and his family's well being. The fear elicited by the presence of such symbols serves as a prime example of the HOSTILE WORK ENVIRONMENT experienced by many federally employed racial, ethnic, and religious minorities.

U.S. ARMY CORPS OF ENGINEERS
New England District Office - Concord, MA



Hanging Noose – "Staff Attitude Adjustment Notice"

The above hanging noose and sign were found in an African-American's workspace on September 10, 1998 at the U.S. Corps of Engineers District Office, Concord, MA. The noose and sign are typical examples of the HOSTILE WORK ENVIRONMENT facing many federally employed racial minorities today.

The former Equal Employment Manager at Concord, target of the racial epithet, was unjustly removed from his position due, in large degree, to trying to correct serious racial problems that had been previously documented. The following is the education, work experience, and overall qualifications of the highly qualified African-American male who was removed as EEO Manager:

- **BA University of Maryland**
- **Master of Social Work, Boston College**
- **Doctoral Studies, MASS Institute of Technology**
- **Significant senior level management experience**
- **Part-time Advisor Boston College Graduate School of Social Work**

Does this man deserve to be labeled as "intellectually deficient?"

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 22 2000

OFFICE OF
PREVENTION, PESTICIDES AND
TOXIC SUBSTANCES

MEMORANDUM

SUBJECT: 120-day Detail Work Assignment

FROM: William H. Sanders III, Director
Office of Pollution Prevention and Toxics

TO: Marsha Coleman-Adebayo

Effective Monday, June 26, 2000, you are being detailed for 120 days to the position of Environmental Protection Specialist, in the Immediate Office of the Director, Office of Pollution Prevention and Toxics. In this position, your supervisor will be the Acting Deputy Office Director, Dr. Mary Ellen Weber. For this detail, your office will be located in Room E527B.

During this detail, your initial assignments are to:

1. Conduct research, from an environmental and health perspective, identifying and examining existing reports, studies, surveys, and other relevant documents, and provide a written assessment on these materials which would inform discussions and the development of the office's new "Chemically Safe America" initiative.

Among the questions you are to examine are:

- How many chemical substances are typically in the human body?
- What are the primary routes of entry for these chemicals?
- What is the current state of environmental epidemiology?
- What are some of the major and ongoing related issues in environmental, heath and safety fields?

Additionally, I will need you to prepare background materials and talking points for an upcoming meeting with officials from the National Institute of Environmental and Health Sciences (NIEHS).

2. Conduct research identifying and examining existing reports, studies, surveys, and other relevant documents and provide written assessments on these materials which deal with the nature and extent of toxins in products. This information will serve the Environmentally

Preferable Purchasing (EPP) program, which provides leadership to the Federal government in identifying and procuring "green" products and services, and other OPPT programs.

Among the questions you are to examine are:

- What is the extent of growth of toxics in consumer products?
- What information sources exist to help determine the presence of toxics in consumer products?
- Is there a recent increase in the use of bio-based substances in products?

You are to develop a draft set of performance standards for this detail assignment. Dr. Weber will be available to discuss the draft with you and then implement your performance standards. She will establish a time to meet with you to discuss the responsibilities outlined above in more detail. Roberta Ward will set up an appointment with her for you as soon as possible.

I look forward to having you once again join the staff of the Immediate Office. Our Chemically Safe America initiative is important to this office and I have every confidence that you can contribute to its development.

cc: Mary Ellen Weber
David J. Kling

Dr. Marsha Coleman-Adebayo
6017 Cairn Terrace
Bethesda, Maryland 20817

The Honorable Christine Todd Whitman
Administrator
US Environmental Protection Agency
Washington, D.C.

February 5, 20001

Dear Administrator Whitman,

I write to thank you for your letter of February 1, 2001 to Ms. Wilma A. Lewis, U.S. Attorney for the District of Columbia. I deeply appreciate your request to the Department of Justice to withdraw the motion for a new trial or for remittitur of the verdict. The past eight years have been extremely difficult for me and my family as well as other victims of racial and sexual discrimination at EPA. It is hoped that your administration will send a clear and unequivocal message that prohibited personnel practices will no longer be tolerated at the Agency. I personally thank you for the action that you have taken.

Unfortunately, however, the retaliation against me continues at the Agency. As a result of the hostile work environment that I have endured for nearly ten years, I have developed hypertension, and placed at risk for stroke, heart attack and other complications. My Cardiologist, Dr. Martin Kanvosky, has provided three detailed letters to my supervisor, Dr. William Sanders, containing confidential medical information and requesting that I work from home immediately because of my medical condition. Dr. Kanvosky has been extremely clear in his letters, my hypertension is a result of workplace stress.

After a number of my memos and my doctor's letters went unanswered regarding our request for me to immediately work from home in order to avoid a medical emergency, I was forced to resort to court intervention through a temporary restraining order (TRO). As a result of the TRO, the Agency and I entered into an out-of-court settlement agreement that permitted me to work from home. I would like to state clearly, my request is for reasonable accommodations to work from home on a permanent basis to accommodate my health condition. This is a provision that is routinely granted to many EPA employees.

A provision of the December 21, 2000 settlement signed by Susan Wayland, former Assistant Administrator for OPPT stated, " I expect to make a decision on your request

for medical flexiplace on or before that date [February 12, 2001] and will inform you as soon as that decision is made." On January 25, 2001, however, Dr. Sanders wrote another letter to me requesting more information from my physician and stating that Dr. Christopher Holland, who works for EPA on a contractual basis, would be assessing my request. It should be noted that Dr. Christopher Holland, was a defense witness, and thus testified against me during my trial as did my current supervisor, William Sanders.

My doctor has informed me that he is no longer willing to continue to submit to the constant and repeated requests for more and more information. This is due to EPA's dismissive and non-responsive approach to his numerous letters. I am clearly still targeted for harassment and now it is spilling over to my Cardiologist – he doesn't deserve this kind of disrespectful and unfair treatment from his government.

I would ask for your direct intervention on the matter noted above. I wish to work with you and your administration under an umbrella of justice, equity and human dignity for all. Again, I thank you for your letter to the Department of Justice.

Sincerely,

Marsha Coleman-Adebayo

Attachments:

December 21, 2000 memorandum from William Sanders (signed by Susan Wayland)
January 25, 2001 memorandum from William Sanders
Letter to William Sanders from Dr. Martin Kanovsky (February 2, 2001)
Letter to William Sanders from Dr. Martin Konovsky (December 5, 2000)
Letter to William Sanders from Dr. Martin Kanovsky (November 17, 2000)
Letter to William Sanders from Dr. Martin Kanovsky (October 30, 2000)

FISHER AND KANOVSKY, P.C.
CARDIOLOGY

r P. Fisher, M.D., F.A.C.C. Martin S. Kanovsky, M.D., F.A.C.P., F.A.C.C.

October 30, 2000

Dr. William Sanders
Office of Polhution Prevention of Toxic Substances
401 M Street, S.W.
Washington, D.C. 20460

Dear Dr. Sanders:

I am the attending Cardiologist for Dr. Marsha Coleman-Adebayo. Her internist referred her to me because of her elevated blood pressure. Past attempts to control her blood pressure with medication have not been successful. It is my strong recommendation that her workstation be immediately transferred to her home. I would like to see if that change helps to reduce the stress she has at work that is raising her blood pressure. Sustained elevations in blood pressure can increase the risks of stroke or heart attack. I would like her to work from her home for at least one month. During that time hopefully we can get her blood pressure under control. At that point we can reassess how best to treat her hypertension. I would be happy to discuss this with you further should you have any questions.

Sincerely yours,

Martin S. Kanovsky, M.D., F.A.C.P., F.A.C.C.

3/01 136/86 - Dawn

FISHER AND KANOVSKY, P.C.
CARDIOLOGY

Gary P. Fisher, M.D., F.A.C.C.

Martin S. Kanovsky, M.D., F.A.C.P., F.A.C.C.

Dr. William Sanders
Office of Pollution Prevention and Toxics
EPA
Washington, D.C. 20460

November 17, 2000

Dear Dr. Sanders,

On October 31, 2000, I wrote to you regarding my patient, Dr. Marsha Coleman-Adebayo. I indicated that I am her attending Cardiologist and that I am treating her for elevated blood pressure. I called to your attention that elevated blood pressure can result in stroke or a heart attack. I strongly recommended that she be allowed to work from home in order to avoid work place stress and as an attempt to avoid any medical complications. Dr. Coleman-Adebayo has informed me that she has completed and submitted the necessary medical flexi-place form to your attention and has attached my letter to you as documentation. Again, I emphasize my strong recommendation is that she be allowed to work from home immediately.

As a result of her medical examination today, in which I found that her blood pressure is elevated, I am recommending that she take medical leave for at approximately three weeks or until such time as her blood pressure is within an acceptable range. It is my medical opinion that Ms. Coleman-Adebayo immediately go on medical leave.

If you have any additional questions, please feel free to call me at (301) 656-3334.

Sincerely,

Martin S. Kanovsky, M.D., F.A.C.P., F.A.C.C.

HER AND KANOVSKY, P.C.
CARDIOLOGY

ıry P. Fisher, M.D., F.A.C.C.

Martin S. Kanovsky, M.D., F.A.C.P., F.A.C.C.

Dr. William Sanders, Director
EPA
Office of Pollution Prevention and Toxics
Mail Code 7401
Washington, D.C. 200460

December 5, 2000

Dear Dr. Sanders:

For the record, this is the third letter (October 30 and November 17, 2000) that I am writing to you regarding the health of my patient, Dr. Marsha Coleman-Adebayo. I would hope that you might be able to set aside any other issues and focus on the implications of elevated blood pressure and its possible long-term effects and risks of a stroke, heart attack, and renal failure. Not only is Dr. Coleman-Adebayo an employee at the EPA, she is also a wife and mother of two young children.

Your decision to "suspend" any decision on my request that her workplace be transferred to her home places her at increased risk. In order to get her blood pressure under control we need to remove her from any environment factors that could be raising it. To just give her more and more medications to lower her blood pressure would be medically irresponsible. Heart attacks and strokes are not predictable; "suspending" a decision on this critical issue places my patient in an untenable and inhumane position – of having to choose between her health and her employment. My strong and repeated medical opinion remains the same that Dr. Coleman-Adebayo work-place should be immediately transferred to her home office once I release her from medical leave.

It should also be noted that in my October 30th letter, I requested that she be allowed to work from home. Although I offered to speak with you regarding this matter, I did not receive a telephone call. In your letter you state, " The letter from your doctor is non-specifc as to whether you are able to perform your duties in a competent manner when you blood pressure is elevated." It is my opinion, that if my recommendation had been instituted in early November, we may have avoided the current employment and medical situation. By November 17, 2000 I was concerned enough about her heath status that I made the medical decision to place her on immediate medical leave. Your recent question as to, "whether your medical condition is so severe as to prevent you from being able to perform the duties in your position description" seems at best questionable.

Answers to questions (a) and (b) from page 2

(a). Dr. Coleman-Adebayo's blood pressure readings are as follows:

5530 Wisconsin Avenue Suite 730 Chevy Chase, Maryland 20815-4486 Phone (301) 656-3334 Fax (301) 656-3168

October 27 , 2000	148/95
November 6, 2000	126/75
November 17, 2000	155 /100

(b). I have noted in my two previous letters that it is my medical opinion that her hypertension is the result of workplace stress and not a particular work assignment or work "duties". Therefore, question (b) is not relevant to this particular case. According to my patient she has worked at EPA for the past decade on other challenging assignments that did not result in hypertension.

Again, as I indicated in my October 30, 2000 letter, I believe of Dr. Coleman-Adebayo will be able to perform her responsibilities, once her blood pressure has been stabilized, from a home office. I would appreciate your making this option available to her as soon as possible.

Thank you.

Sincerely yours,

Martin S. Kanovsky, M.D., F.A.C.P., F.A.C.C.

cc:
Marsha Coleman-Adebayo
David H. Shapiro, Esq

FISHER AND KANOVSKY, P.C.
CARDIOLOGY

ary P. Fisher, M.D., F.A.C.C.

Martin S. Kanovsky, M.D., F.A.C.P., F.A.C.C.

Dr. William Sanders, Director
EPA
Office of Pollution Prevention and Toxics
Mail Code 7401
Washington, D.C. 200460

February 2, 2001

Dear Dr. Sanders:

This is now the fourth time I have written to you. It is obvious that you have not read my previous letters. Rather than repeat everything in them I am enclosing copies of them and hope that this time you will read them. Dr. Coleman- Adebayo should be able to do her job at home. It is not the job status creating the stress and raising her blood pressure but her difficult to work environment at EPA.

Thank you.

Sincerely yours,

Martin S. Kanovsky, M.D., F.A.C.P., F.A.C.C.

cc:
Marsha Coleman-Adebayo
David H. Shapiro, Esq

FISHER AND KANOVSKY, P.C.
CARDIOLOGY

Gary P. Fisher, M.D., F.A.C.C.

Martin S. Kanovsky, M.D., F.A.C.P., F.A.C.C

April 30, 2001

TO WHOM IT MAY CONCERN

Re: Marsha Coleman- Adeboyo

I am writing regarding Marsha Coleman-Adeboyo. I have been her cardiologist since October 27, 2000. She was referred to me because of a blood pressure of 157/117. Her elevated blood pressure started at around the same time when her stress at work became intense. She has complained to me regarding harassment at her position and has had extensive legal procedures and I am sure you are aware of. I have written repeatedly recommending that her work environment and if possible her position be altered. Temporarily, she was able to work at home. However, I now understand that she is being required to return to her work environment which has been found to elevate her blood pressure and require medication. I have read the report from Dr. DiBianco. I , too, am a Board Certified Internist and Cardiologist and I am also a Fellow of the American College of Cardiology and a Fellow of the American College of Physicians. I do not think that it would be prudent to wait for manifestations of target organ disease as Dr. DiBianco suggest. I would not wait until she develops renal failure, a heart attack, or stroke prior to making some adjustments in her change in work environment. Dr. DiBianco discusses the necessity for "immediate disability". I do not think disability is necessary, but what is necessary is a change in her work environment that clearly has been elevating her blood pressure.

I would be happy to discuss this with you further. I would like to refer you to my previous correspondence.

Martin S. Kanovsky, M.D., F.A.C.P., F.A.C.C.

FISHER AND KANOVSKY, P.C.
CARDIOLOGY

Gary P. Fisher, M.D., F.A.C.C. Martin S. Kanovsky, M.D., F.A.C.P., F.A.C.C.

Blood Pressure Readings for Martha Coleman-Adebayo

9/00 - 157/116
9/27/00 - 170/105
10/27/00 - 148/95
11/6/00 - 125/75
11/7/00 - 140/90
11/17/00 - 155/100
11/22/00 - 150/92
11/29/00 - 150/100
11/30/00 - 136/86
12/[illegible]/00 - 160/100
1/2/01 - 140/97
1/4/01 - 145/97
2/2/01 - 132/80
2/7/01 - 144/96
2/15/01 - 132/80
2/16/01 - 132/88
3/28/01 - 142/96 (without medicine)
4/18/01 - 154/88

Patricia Hockaday CRA

5530 Wisconsin Avenue Suite 730 Chevy Chase, Maryland 20815-4486 Phone (301) 656-3334 Fax (301) 656-3168

Dr. Kanovsky

Robert DiBianco, MD
Member, Cardiovascular Consultants, PA
Rockville, MD
and
Director, Cardiology Research,
Heart Failure and Risk Factor Clinics
Washington Adventist Hospital,
Takoma Park, MD, 20912 U.S.A.
and
Associate Clinical Professor of Medicine
Georgetown University, School of Medicine
Washington, DC

24-hour Voice Mail 301-891-5490
FAX 301-891-5190
Home phone number 202-363-2293
email DrDiBianco@aol.com

Labor and Relations Staff
Office of Human Resources and Organizational Services (3616A)
Ariel Rios Bldg. Room 5358 North
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Ms. Linda Wallace (lindawallace@epa.gov; tel 703-834-8114)

Thank-you for your recent request to review the problem of "Request for reasonable accommodation" made by Dr. Marsha Coleman-Adebayo on the basis of her medical condition of hypertension. I have reviewed the documents which you provided to me by FAX on 3/29/2001. These include:

1. EPA Position description (Position Number T-D-268) Environmental Protection Specialist GS-0028-15
2. Letters to Dr. William Sanders, Director, Office of Pollution, Prevention and Toxics from Dr. Martin Kanovsky, the cardiologist currently treating Ms. Coleman-Adebayo
   - Dated October 30, 2000
   - Dated November 17, 2000
   - Dated December 5, 2000
   - Dated January 17, 2001
   - Dated February 2, 2001
3. Memorandum from William H. Saunders III to Ms. Coleman-Adebayo entitled "Request for Reasonable Accomodation"
4. Report of Christopher S. Holland, MD, MPH, FACEP, FACPM, Occupational Medicine Specialist, Federal Occupational Health

I have further contacted Dr. Kanovsky by telephone on the afternoon of April 5, 2001 and briefly discussed with him the problem of hypertension as he views it affects Ms. Coleman-Adebayo. He indicated:

1. that as the patients advocate, he has only the information provided by Ms. Coleman-Adebayo about her work situation at EPA and that the patient views the work environment "as very stressful" as a result of her previous lawsuit with the agency.
2. that Ms. Coleman-Adebayo has mild HBP when outside of a stressed environment and no other major risks of atherosclerotic cardiovascular disease.
3. that Ms. Coleman-Adebayo's BP has ranged "up to 170-180 systolic" while Ms. Coleman-Adebayo was "stressed in her work environment" and was not adequately controlled despite monotherapy with Altace (ramipril) 15 mg /day.
4. that her BP was more easily controlled when she was off work on leave and taking only 5 mg of Altace (ramipril) daily.
5. that multiple drug therapy for control of her BP has not been instituted and should not be required in view of the clear association with work stress.
6. that he views the needs of his patient as a more relaxed work environment.

As an American College of Physicians, Board-certified Internist and an American College of Cardiology Board-certified Cardiologist who is a The Director of Cardiology Research for a 10-member Department of Cardiology at the Washington Adventist Hospital, I am well aware of the currently recognized and accepted principles of care for the patient with hypertension which afflicts up to 60 million Americans based on definitions applied.

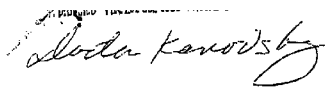
1. I view the request "that her workstation be immediately transferred to her home" as stated in the letter of October 30, 2000 by Dr. Kanovsky as an unreasonable and unsupportable medical intervention.

Even if, in fact, the work environment is the cause of the patients higher levels of HBP, as Dr. Kanovsky and Ms. Coleman-Adebayo purport, it is an unreasonable burden to require a place

of business to change their business practices to accommodate a patient with mild HBP for this reason. This situation is no different than the stress related to a job that requires physical exercise or other types of emotional stress (such as calculations or problem solving rather than interpersonal conflicts) which are recognized to raise BP. Patients with baseline elevations of BP are more likely to respond with higher BP responses to most stressful stimuli whether exertise or emotionally triggered. The reduction of stress-mediated BP elevations is recognized with better baseline BP control. Furthermore, there is incomplete information regarding the importance of transient elevations in BP while in the workplace. (In the instance of transient elevations associated with physical exertion, there is a literature that suggests benefit with regard to cardiovascular risks.) That Ms. Coleman-Adebayo's higher levels of HBP are solely the result of her work place stress is unconfirmable. It is recognized that HBP is multifactorial. The data presented regarding the BP measurements are far too scant to draw the specific conclusion that if the workplace were changed, the BP would be more responsive to medication and "safer" for the patient. I interpret the purported association of HBP recorded in the doctor's office (hence outside the workplace) as unsubstantiated with respect to causation. I believe the BP readings cannot be used to support the patients claim.

2. I believe the placement of the patient on immediate disability for mild to moderate hypertension without other manifestations of target organ disease and prior to a trial of effective pharmacologic therapy is extraordinary under the usual standards of medical practice.

There is no question that HBP is a major cardiovascular risk factor for myocardial infarction and stroke, as stated by Dr. Kanovsky. The management of patients requires lifestyle modifications and in many, many patients the concurrent use of one or more pharmacologic therapies. I view the use of standard recommendations for lifestyle modification combined with an ACE inhibitor drug such as, Altace (ramipril) as standard therapy. The addition of further therapy if BP is not controlled is not "medically irresponsible" as stated in the letter of December 5, 2000, but rather the expected standard of medical practice. Of course, it is the decision of the patients personal physician to care for the patient in the specific way in which that physician feels is best. There is however, in the material presented regarding Ms. Coleman-Adebayo, nothing that suggests the



necessity for immediate disability. It would seem appropriate that control of BP should proceed, as it does in virtually all patients with this diagnosis, within the framework of the daily environment. This is not to suggest that modification of a patients emotional stress factors is inappropriate, only that the requirement for a business to adjust business practices as a requirement of an individual with such a common problem is unreasonable and not justifiable. A business instructed and forced to change business practices to meet purported needs of this unsubstantiated nature would, without dispute, suffer immeasurably. I believe the request for immediate disability on the basis of hypertension and cardiovascular risks associated with it in the case of this patient, is exaggerated and outside of the current standard of medical practice.

Sincerely yours,

Robert DiBianco, MD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D.C. 20460

APR 20 2001

OFFICE OF PREVENTION, PESTICIDES AND TOXIC SUBSTANCES

MEMORANDUM

SUBJECT: Request for Reasonable Accommodation Under the Rehabilitation Act

FROM: William H. Sanders III, Director
Office of Pollution Prevention and Toxics

TO: Marsha Coleman-Adebayo
Environmental Protection Specialist
Office of Pollution Prevention and Toxics

This is in response to your request to work at home full-time as a reasonable accommodation under the Rehabilitation Act of 1973, as amended, for your medical condition of high blood pressure. You had requested to work at home under the Environmental Protection Agency's (EPA or Agency) medical flexiplace program on November 13, 2000. However, in a February 5, 2001 letter to Administrator Whitman, you indicated that your request is for "reasonable accommodations to work from home on a permanent basis to accommodate my health condition."

In a letter dated March 30, 2001, Stephen L. Johnson, the Acting Assistant Administrator for the Office of Prevention, Pesticides, and Toxic Substances, advised you of the information that would be necessary to make a decision on your request for reasonable accommodation, and further offered you an Independent Medical Evaluation (IME). You did not provide any information in response to Mr. Johnson's March 30, 2001 letter, nor did you indicate whether you wished to have an IME. Your physician, Dr. Martin Kanovsky, spoke with Dr. Robert DiBianco, a Board-certified cardiologist who is working under contract to the Agency, to discuss your request. A copy of Dr. DiBianco's report is attached.

Based upon Dr. DiBianco's professional opinion, which is based on a review of all of the medical documentation that you provided as well as a discussion with your physician, I cannot approve the requested accommodation of working at home full-time. As noted by Dr. DiBianco, the claim that your "higher levels of [high blood pressure] are solely the result of [your] work place stress is unconfirmable." Accordingly, Dr. DiBianco interprets "the purported association of [high blood pressure] recorded in the doctor's office (hence outside the workplace) as unsubstantiated with respect to causation," and "the [blood pressure] readings cannot be used to support the patients claim." Further, neither you nor your physician suggested any alternative accommodation for your medical condition.

Because I cannot approve your requested accommodation, I will expect you to return to your duty station at Waterside Mall, Room 527, East Tower. You are currently on sick leave and receiving leave from EPA's Leave Bank for a medical condition unrelated to your request for reasonable accommodation and medical flexiplace. Based on the report from Paul J. MacKoul, M.D., your physician, your estimated date of recovery is April 27, 2001. Therefore, you should report for duty on April 30, 2001.

You may contact Roz Simms on (202) 260-2033 if you have any questions related to this memorandum. In addition, you may schedule an appointment to meet with me to discuss this matter by contacting Ms. Simms.

Attachment

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In Memory of Ron Isler

Read Why Taxpayer's Need Passage of the Notification and Federal Emplo Discrimination and Retaliation Act of 2001 (No Fear Act): Here's An Exam Minority Business Development Agency (MBDA)

The Department of Commerce's Minority Business Development Agency (I only Federal Agency created specifically to foster the creation, growth anc minority-owned businesses in America. MBDA provides assistance to socia economically disadvantage individuals who own or wish to start a busines include: Asian Pacific Americans, Asian Indians, Black Americans, Eskimo: Native Americans, Spanish Speaking Americans, and Puerto Ricans.

In light of MBDA's vital mission it is critical that Commerce officials ensur workforce is free of policies, practices and proceduresthat foster hostile e work discrimination. Unfortunately, the Department has failed miserably. Isler a MBDA minority employee died of a heart attack. Commerce colleag suggested that STRESS imposed by an extremely hostile work environme contributed to Mr. Isler's death. Mr. Isler, reportedly a college educated n attended Harvard, was recently appointed to the Department's Diversity C even the Council, that some say was created to veil the discrimination, cc relief for Mr. Isler. (See one of the many e-mails he wrote to MBDA's man documenting his torment while employed at Commerce.)

From: Isler, Ron
Sent: Wednesday, April 18, 2001 9:17 AM
Subject: Ongoing Staff Racial Tension and Harassment

"From the initial meeting on 2/2/01 to the most recent (4/4/01..@ 70 da
OMA staff members have repeatedly identified and advised you of the mu
of prohibited behavior practiced by and tolerated with in OMA.The actions
activities as allege by the several staff members are/were clearly prohibit
DOC rules and regulations (ie.DOC/DAO 202-955). Please note as I have
several of our meetings (2/2,2/21,3/23,et.al.) to be removed from the on
racial and harassing environment in OMA and that to date no relief has oc

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URGE YOUR CONGRESSMAN/SENATOR TO SUPPORT THE NO FEAR ACT O
(H.R. 169)

On January 3, 2001, Congressman James Sensenbrenner introduced the I
Federal Employee Antidiscrimination and Retaliation Act of 2001 (No FEAF
the House of Representatives. On January 29, 2001, Senator John Warne
Federal Employee Protection Act of 2001 [S.201] in the Senate. Both bills
Federal agencies be held accountable for violating antidiscrimination & wh
protection laws. The No FEAR Act would require the responsible agency to
judgments, rather than a blameless, bottomless, nebulous, faceless "slus
as the Treasury Judgment fund. The Act would also require that each Fed
an annual report to Congress listing:

* the number of cases in which an agency was alleged to have violated a
discrimination or whistleblower statutes

* the disposition of each of these cases

* the total of all monetary awards charged against the agency from thes

* the number of employees disciplined for discrimination, retaliation or h

Federal Department's need to be held accountable for loss lives, low mora
costs (expenses associated with Professional liability Insurance; complain
attorney representation, and expert witnesses as well as direct costs accr
employing agencies while participating in the appeals process, arbitration
costs tied to lost productivity in the workplace, employees unreimbursed
court costs.)

The Minority Business Development Agency (MBDA)

The Department of Commerce's Minority Business Development Agency (MBDA) is the *only* Federal Agency created specifically to foster the creation, growth and expansion of minority-owned businesses in America. MBDA provides assistance to socially or economically disadvantage individuals who own or wish to start a business. Such persons include: Asian Pacific Americans, Asian Indians, Black Americans, Eskimos, Hasidic Jews, Native Americans, Spanish Speaking Americans, and Puerto Ricans.

In light of MBDA's vital mission it is critical that Commerce officials ensure that its workforce is free of policies, practices and procedures that foster hostile environment of work discrimination. Unfortunately, the Department has failed miserably. On April 28, Ron Isler a MBDA minority employee died of a heart attack. Commerce colleagues have reported that STRESS imposed by an extremely hostile work environment may have contributed to Mr. Isler's death. Mr. Isler, who completed graduate work at both Harvard University and Massachusetts Institute of Technology (MIT), later taught urban planning and management courses at MIT. Circa January 2001, he was appointed to the Department's Diversity Council. But not even the Council that some suggest was created to veil the discrimination could provide relief for Mr. Isler. (See two of the many e-mails Mr. Isler wrote to MBDA's management documenting his torment while employed at Commerce.)

From: *Isler, Ron*
Sent: *Wednesday, April 18, 2001 9:17 AM*
To:
Subject: *Ongoing Staff Racial Tension and Harassment*

"From the initial meeting on 2/2/01 to the most recent (4/4/01..@ 70 days) from 4 to 6 OMA staff members have repeatedly identified and advised you of the multiple incidences of prohibited behavior practiced by and tolerated with in OMA.The actions and the activities as allege by the several staff members are/were clearly prohibited by OPM and DOC rules and regulations (ie.DOC/DAO 202-955). Please note as I have requested during several of our meetings (2/2,2/21,3/23,et.al.) to be removed from the ongoing negative racial and harassing environment in OMA and that to date no relief has occurred . . .

In Memory of Mr. Ron Isler

Dr. Marsha Coleman-Adebayo
6017 Cairn Terrace
Bethesda, Maryland 20817

The Honorable F. James Sensenbrenner
Chairman, Committee on the Judiciary
US House of Representatives
Washington, D.C. 20515

Dear Chairman Sensenbrenner,

I write to thank you for the honor and opportunity to appear before your committee to discuss H.R. 169 the "Notification of Federal Employees Anti-discrimination and Retaliation Act of 2001." I am certain that Dr. Martin Luther Kings, Jr. would have devoted a substantial amount of his effort and passion in fighting for the passage of this historic bill.

I thank you for your commitment to the civil rights of all Americans and in particular, the civil rights of federal employees. I have also enjoyed the professional competence of your staff, particularly, Ms. Beth Sokul. She has been an extraordinary ambassador for your office. We thank you for placing her skills and considerable ability at the helm of this legislation.

I will call your office, after the Labor Day holiday to request a meeting with you to discuss the next steps in our struggle to bring this legislation to the floor of the House and Senate. I have attached my answers to your post-hearing questions. Again, I thank you for the opportunity to appear before your Committee. I look forward to thanking you in person.

Sincerely,

Marsha Coleman-Adebayo

cc:
Ms. Beth Sokul

SUBCOMMITTEE ON THE JUDICIARY
US HOUSE OF REPRESENTATIVES
May 9, 2001 Hearing on H.R. 169
the "Notification and Federal Employee antidiscrimination and Retaliation Act of 2001"

Post-Hearing Questions:

1. **Please describe what kind of message an Federal agency sends to the employees when its managers and employees who discriminate are not discipline.**

Federal agencies, such as the US EPA, that allow managers to violate prohibited personnel policies, such as discrimination and retaliation against whistleblowers send a clear and unequivocal message that it will not enforce the 1964 Civil Rights Act. Not only are these Agencies in violation of the 1964 Civil Rights Act but also their own code of conduct. For example, the US EPA, Office of Administration and Resources Management, on November 8, 1993, issued an "EPA Order - Conduct and Classification". This Order describes policies and procedures covering employee misconduct. For example, Nature of Offense No.33 outlines disciplinary actions for such offenses as "Discrimination based on race, color, sex, religion, national origin, age, maritial status, political affiliation, or handicap and thus its employees. Nature of Offense No. 32, lists disciplinary actions for violators of "sexual harassment".

In the case of many Agencies, the "code of conduct" and its procedures are completely ignored except as they pertain to employees that are considered different, difficult and unwanted. A federal workplace system which disregards rules and disciplinary guidance also disregards the fundamental bases of equality in that environment - the merit system. Indisputably, the antithesis of a merit system is a system built on corruption, cronism and patronage. Within the parameters of a system built on patronage, some people, such as managers, are more equal than others. Some people are intimidated, harassed and fired while those who perform these illegal acts prosper. It is virtually impossible to discriminate, squelch dissent and critical thought and expect either sound science or useful programs.

The morale of the Agency is completely shattered when that political and/or bureaucratic structure supports illegal corporate behavior. During the October 4, 2000 Hearing entitled: "Intolerance at EPA - Harming People, Harming Science?" then Science Committee Chairman F. Sensenbrenner stated:

"While EPA has a clear policy on dealing with employees that discriminate, harass and retaliate against other EPA employees, no one apparently involved in the Coleman-Adebayo or Nolan cases have yet to be disciplied by EPA."

On August 2, 2001- the Office of the EPA Administrator issued an Agency memorandum - in response to the August 2000 jury verdict in my case

(Coleman-Adebayo v. Browner) , in which the EPA was found to have violated my civil rights in the areas of race, color, sex and hostile work environment. With no regard to the EPA Code of Conduct, the decision of the court or congressional directives, the Administrator's Office effusively lavished praise on two of the EPA managers named in the discrimination complaint for racial and sexual discrimination. In the memo to the Agency, the Office of the Administrator never acknowledges the managers' role in civil rights abuse while deploying two of the managers named in my complaint to positions of high visibility, influence and power. This memoradum reads in part, "

"Alan Hecht will serve as the Director of the Office of Cooperative Environmental Management within the Office of the Administrator. Alan Sielen will assume a new position as Counselor to the Assistant Administrator for International Affairs with the Office of Prevention, Pesticides, and Toxic Substances" [sic].

The EPA Code of Conduct which mandated such disciplinary actions as," 30 day suspension to removal" was ignored.

The message that this decision sends is that the ultimate punishment of an EPA employee found guilty of discrimination is to be moved from one office to another - one need not fear dismissal or even a letter of reprimand. In the future, other EPA managers found guilty of violating prohibited personnel practices, such as discrimination, can use this decision as a precedent.

Instead of firing the managers who violated my civil and human rights, the EPA Administrator sent a message throughout the Agency, indeed throughout the nation, that managers would not be held accountable for their behavior or face the appropriate consequences. Unfortunately, the American public had to finance their illegal behavior.

We need Congress to perform its essential oversight role. The fact that two senior managers named in my discrimination case were elevated to more powerful and influential positions within EPA is a clear indication that the American public and federal employees can not rely on Agency heads to ensure that the 1964 Civil Rights Bill will be enforced. The recent decision by EPA illuminates the need for Congress to pass the NO FEAR Bill and to aggressively assert its authority over government agencies and departments to protect the human and civil rights of federal employees.

Please describe why you believe it is important to hold agencies directly accountable and require the agencies to pay for discrimination judgements and settlements directly out of the budget.

2a. Do you think that accountability is needed to enforce the discrimination and whistleblower laws?

Agencies that discriminate will only begin to take those complaints seriously when they are forced to accept corporate and financial responsibility and consequences for participating in illegal activities, such as discrimination and retaliation against

whistleblowers. At present, there is no penalty for failure to enforce the 1964 Civil Rights Act. Therefore, Departments and Agencies are, for all practical purposes, exempt from federal civil rights laws. Managers are held above the law and rarely are employees in senior positions disciplined for civil rights violations. The legal structure in most Agencies and Departments support a two-tier system. The legal defense costs for managers are financed by US taxpayers, i.e., EPA and Department of Justice attorneys , while employees must fund their legal cost from personal funds. The Office of Civil Rights is usually an arm of the Office of the Administrator. Its primary purpose is to protect and defend Agency and Department managers.

The No Fear Bill will force Agencies to accept responsibility and the consequences for violating prohibited personnel policies. If Agencies are allowed to continue to fund their illegal activities through an outside judgement fund, US taxpayers will continue to finance mismanagement instead of useful federal programs.

b. How does the lack of accountability affect performance of federal employees, federal programs and the Federal government in general?

The morale of the Agency is completely shattered when political and/or bureaucratic structure supports illegal corporate behavior. The lack of accountability within the federal structure undermines the morale and integrity of the entire system. Without accountability, the civil service merit system becomes inoperable and corruption and patronage replace competence and efficiency. This kind of system is particularly dangerous when Agencies are responsible for the public health of the American people. For example, I was asked to conduct research in the areas of toxicology and epidemiology. My expertise lies in the areas of international relations, with a concentration in African studies. However, the Agency placed the American public at risk by its retaliatory assignment in which harassment against me was placed above the safety and health concerns of the public.

It is virtually impossible to discriminate, squelch dissent and limit critical debate in the workplace and expect either sound science or useful programs. The NoFear Bill will force government agencies to accept responsibility for their corporate behavior when found in violation of federal laws.

On the issue of how the lack of accountability affects the performance of federal employees, NTEU Executive Vice President, Dwight Welch wrote: The dual standard of treatment takes a subtle, but continuously increasing toll on the worker who is in the "outcast" group. Confidence is replaced by doubt, personal initiative is replaced by waiting to be told what to do, positive
personalities become replaced with defensive personalities. Being told you
are worthless often enough and you start to believe it."

c. As a federal employee who has been subjected to discrimination, do you believe holding agencies accountable by requiring them to pay discrimination judgements would harm or help federal employees?

I believe if the No Fear Bill was operational one year ago, EPA would have settled my case out of court. It was clear from the depositions and the informal investigation that discrimination had taken place. However, since EPA was held financially harmless and managers did not expect any professional or financial consequences, the Department of Justice and EPA attorneys proceeded to press their case. EPA and other federal agencies would began to discipline managers named in discrimination cases and start to take the EEO process seriously. Currently, there is no means of holding those who break the law accountable.

There is no incentive on the part of the Office of General Counsel, Office of Civil Rights, Office of Human Resources, or Labor Relations to conduct an impartial or facts-based investigation. At present, there is an automatic presumption of managerial innocence, even where the facts of a case indicate overwhelming proof of guilt.

Under the current system, Federal agencies, must pay out of their own budgets it they settle in the administrative process. If the agencies fight the case through the courts, however, the agencies do not have to pay for any settlement or court decision. Instead, as you know, the money comes out of the general fund.

a. Under this current system, would you agree that there is a financial incentive to prolong the case regardless of the merits of the government's position?

It is definitely in the interest of the government to prolong the informal and formal complaint process. From the moment of engagement in the EEO process, the employee often becomes the target of retaliation and harassment. For the vast majority of cases, the complainant eventually becomes discouraged and financially broken. Secondly, management has an opportunity to increase the volume of harassment and retaliation on a daily basis. Tactics, such as turning employees against each other, are used effectively by managers. Many employee disengage from the EEO process before an informal settlement can be reached by the Agency.

However, if the employee is prepared to continue the EEO process through the formal channels, the Agency is represented by the Department of Justice, and thus relinguishes any financial responsibility and all financial costs are settled either by the Department of Justice or the judgement fund.

b. Do you believe the current system is beneficial or detrimental to Federal employees?

The current system is highly detrimental to federal employees. Dr. Martin Luther King, Jr., once said the "justice delayed is justice denied". But, in the case of the EEO process, 'justice delayed is justice for the defense'. Since US taxpayers are financing the governments defense against employees, prolonging the EEO process can only

serve the interest of the government. EPA's Unions report that a speedy timeframe serves the employee best. Indeed, the EPA
Professionals' Headquarters Union, NTEU Chapter 280 reports that they universally recommend to complainants not to use the EEO system. The Union often informs EPA employees that the EEO system is corrupt and designed to protect the agency and its management. Alternatively, the Unions argue that its grievance process can be completed to arbitration, if necessary, in only a few months, while it takes years to process an EEO complaint.

c. Do you believe the current system, discourages Federal employees from coming forward with concerns?

The current system definitely discourages Federal employees from coming forward with concerns. Employees readily learn that there is no management accountability or consequences for illegal behavior. In the recent EPA case, managers named in my civil suit were elevated to more influential and powerful positions than before the jury verdict or congressional hearings. In addition, employees who file and or win civil suits are publicly humiliated, isolated and professionally destroyed. Managers, on the other hand, who are named in civil rights complaints are professionally elevated.

The NoFear Bill will force Agencies to accept the consequences of illegal behavior and to discipline managers found liable for discriminatory acts.

SUBCOMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES
May 9, 2001 Hearing on *H.R. 169,*
the "Notification and Federal Employee Antidiscrimination and Retaliation Act of 2001"

Post-Hearing Questions Submitted to the Honorable Kweisi Mfume,

Post-Hearing Questions Submitted by Chairman F. James Sensenbrenner, Jr.,

1. Please describe what kind of message an agency sends to the employees when its managers and employees who discriminate are not disciplined.

2. Please describe why you believe it is important to hold agencies directly accountable and require the agencies to pay for discrimination judgements and settlements directly out of the budget.

   a. Do you think that accountability is needed to enforce the discrimination and whistleblower laws?
   b. How does the lack of accountability affect performance of federal employees, federal programs and the Federal Government in general?

3. Under the current system, federal agencies, must pay out of their own budgets if they settle in the administrative process. If the agencies fight the case through the courts, however, the agencies do not have to pay for any settlement or court decision. Instead, as you know, the money comes out of the general fund.

   a. Under this current system, would you agree that there is a financial incentive to prolong the case regardless of the merits of the government's position?
   b. Do you believing the current system is beneficial or detrimental to Federal employees?
   c. Do you believe the current system, discourages Federal employees from coming forward with concerns?